Citation: R v Oland 2019 NBQB 151
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Docket: SJCR-19-2016

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

HER MAJESTY THE QUEEN,

- and –

DENNIS JAMES OLAND

Date of Hearing:	November 6, 2018 – May 9, 2019
Date of Decision:	July 19, 2019
Before:	Justice Terrence J. Morrison
At:	Saint John, New Brunswick
Appearances:	P.J. Veniot, Q.C., Derek J. Weaver and Jill M. Knee on behalf of Her Majesty the Queen
	Alan D. Gold, James R. McConnell and Michael Lacy on behalf of Dennis James Oland

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DECISION

Morrison, J.

I. INTRODUCTION

[1] Sometime on the evening of July 6, 2011, Richard Oland was brutally bludgeoned to death. His son, Dennis Oland, stands charged with the murder of his father. There is no doubt that Richard Oland was murdered. The only question to be determined by this Court is whether the Crown has proven beyond a reasonable doubt that it was Dennis Oland who committed the murder.

II. CHRONOLOGY

[2] All dates referenced are from 2011 unless otherwise stated. On the morning of July 6, 2011, Richard Oland's long-time secretary, Maureen Adamson, arrived at the Far End Corporation ("FEC") offices located at 52 Canterbury Street in Saint John, New Brunswick at approximately 8:30 a.m. This was somewhat earlier than her usual arrival time. She came in early to meet the cleaning lady because she wanted the cleaning done before a meeting scheduled for 10:00 a.m. in the office.

[3] FEC was a company wholly owned and operated by Richard Oland and was used as the vehicle to manage his investment portfolio. At the time of his death Richard Oland's portfolio had a value of approximately $36 million. The FEC offices were located on the second floor of 52 Canterbury Street in a building owned by John

Ainsworth. The ground floor of the building housed Mr. Ainsworth's business, "Printing Plus".

[4] Robert McFadden, Richard Oland's accountant, arrived at the FEC offices at 9:00 a.m. Although in private practice, and not an employee of FEC, Mr. McFadden worked exclusively for Richard Oland and he conducted his practice from the FEC offices.

[5] July 6 was Richard Oland's first full day back in the office after having been away for the previous couple of weeks for yacht races in the United States and an eight-day fishing trip. A meeting to discuss insurance requirements with Robert McFadden and representatives of Manulife Insurance was scheduled for 10:00 a.m. When Richard Oland had not arrived at the office by 9:30 a.m., Maureen Adamson called his cell phone to remind him of the meeting. The call went to voicemail so Ms. Adamson sent Richard Oland a text but received no response. Ms. Adamson then called Richard Oland on his home line and spoke to him. Richard Oland arrived at the FEC offices shortly after 10:00 a.m., a bit late for the insurance meeting. The meeting lasted until approximately lunch time.

[6] At about noon Richard Oland asked Ms. Adamson to pick up a pizza for lunch from Pizza Hut, located in Brunswick Square. Ms. Adamson returned with the

pizza and the evidence confirms that Richard Oland did not leave the office during the lunch hour.

[7] The remainder of the business day was described by Robert McFadden as a "routine day at the office" with Richard Oland catching up on his affairs after having been away. Sometime in the late morning or early afternoon Richard Oland called Dennis Oland and asked him to execute a trade for him. Dennis Oland testified that the trade involved a stock split which had some irregularities that required calculations so his father could reconcile his own records (see Ex. D-100).

[8] Dennis Oland testified that after speaking to his father regarding the stock trade and realizing that he was in the office, he decided he would go and visit him after work. Dennis Oland made three visits to 52 Canterbury Street between approximately 5:10 and 6:35 p.m. At 5:08 p.m., Dennis Oland is seen on video surveillance leaving his work place at CIBC Wood Gundy. He is seen on security cameras driving up King Street and then onto Canterbury Street where he parked in a parking lot located at the corner of Canterbury and Princess Streets, being the same parking lot where his father's BMW was parked. Dennis Oland walked from the parking lot to 52 Canterbury Street and went up the stairs to the foyer just outside of the FEC offices. He testified that he realized that he had forgotten a green book that had a copy of the Will of Worthington Brice. He had made notes of aspects of the Will that he wished to discuss with his father and left to return to his office with the intention of retrieving it. He did not interact with anyone inside the FEC offices during this first visit. At approximately 5:20 p.m. Dennis Oland

returned to his vehicle. He testified that he decided to drive, rather than walk back to his office, because he wasn't sure whether he was going to return to Richard Oland's office or go directly home. According to both his statement to police and his testimony, Dennis Oland realized on his way back to his office that he did not have the security access card for his office and would not be able to enter. He testified that he decided to return to his father's office anyway as he had a typed version of the Brice Will, albeit without his notes, in the "Brice Research Log" that he had brought with him. The Brice Will was of main interest to his father.

[9] At 5:22 p.m., Dennis Oland's vehicle was captured on surveillance video driving up King Street heading towards Canterbury Street. At 5:25:30 p.m., security footage from Thandi's restaurant parking lot shows Dennis Oland parking his car on Canterbury Street by the brick wall next to Thandi's restaurant. He remained sitting in his car for approximately 10 minutes. In his statement to police and his testimony, Dennis Oland said that he sat in his car for a bit doing some business and checking emails. While Dennis Oland was sitting in his car, Robert McFadden and his son Galen McFadden (who had been doing some summer work at FEC) left the FEC offices. At 5:36:49 p.m., Dennis Oland is seen on video opening the back hatch of his vehicle retrieving a grocery bag and heading toward the FEC office. Maureen Adamson's husband, William Adamson, was waiting in his vehicle out front of the FEC street door. He recalled seeing a man whom he did not know carrying a reusable grocery bag enter the door leading to FEC.

[10] Dennis Oland's second visit to the FEC office began at approximately 5:40 p.m. Dennis Oland walked up the stairs of 52 Canterbury Street and was greeted by Maureen Adamson. Ms. Adamson was still in the office but was preparing to leave for the evening as her husband was outside waiting for her. Ms. Adamson spoke briefly to Dennis Oland regarding his daughter Hannah's success at a recent basketball tournament. She also asked Dennis Oland to take a camp logbook (the "Logbook"), belonging to his mother's brother, Jack Connell, to his mother Constance Oland. Ms. Adamson testified that she had spoken to Constance Oland who was anxious to get the Logbook back to her brother. Ms. Adamson left a few minutes later at approximately 5:45 p.m. and recalls ensuring that the door leading to the alleyway on the second floor was locked. When Ms. Adamson left the office for the day, Richard Oland was at his desk with Dennis Oland standing beside him, and both were engrossed in a conversation about genealogy: a topic of mutual interest.

[11] At approximately 6:12 p.m., the accused left Richard Oland's office after this second visit. Between the time he left his father's office and getting to his car, Dennis Oland sent a text message to his sister Lisa Bustin which he intended to send to his wife Lisa Andrik-Oland. It read: "I am at my dad's office doing history stuff. I shud [sic] not be too long".

[12] After leaving his father's office the second time, Dennis Oland walked south towards the intersection of Canterbury and Princess Streets, being the opposite direction from where his car was parked. He then crossed over to the Thandi's side of

Canterbury Street (being the side on which his car was parked) before again crossing back to the FEC side of Canterbury Street. Finally, he crossed back over to the Thandi's side of Canterbury Street to where his car was parked. Video surveillance from the Thandi's parking lot camera shows the accused arriving at his vehicle carrying a reusable grocery bag at 6:12 p.m. He is seen tending to the trunk of his car and then leaving in his vehicle at 6:15 p.m. Dennis Oland traveled south on Canterbury Street towards Princess Street, rounded his car back onto King Street and then back onto Canterbury Street. He then continued down Canterbury Street, made an illegal left turn onto Princess Street, and traveled the short distance across Princess Street into a gravel parking lot on the corner of Princess and Canterbury Streets.

[13] At approximately 6:20 p.m., Dennis Oland returned to his father's office for a third and final visit. He testified at trial that he returned because he had forgotten the Logbook he was meant to deliver to his mother. According to Dennis Oland's testimony, he spent about 10 minutes discussing logbook entries with his father. At approximately 6:35 p.m., Dennis Oland left the FEC offices and returned to his car. While he was leaving the gravel parking lot, he received a call from his wife Lisa inquiring where he was. Cell phone records confirm the call was received at 6:36 p.m. (Ex. D-99).

[14] Dennis Oland then left the gravel parking lot driving toward his home in Rothesay. On his way home he stopped at the Renforth Wharf at approximately 6:45 p.m. Dennis Oland testified that he stopped at the wharf in the hopes of seeing his

children. According to his testimony, Dennis Oland noticed a beer bottle (or bottles) lying at the foot of the wharf, stopped to pick it up and placed it in the reusable Compliments grocery bag he said had taken with him to his father's office on July 6. He testified that he may have put the bottle in the garbage can at the wharf or he may have placed it in the garbage at his home. He then walked to the end of the wharf and looked for his children but did not see them. He sat for a moment and then left for home at approximately 6:50 – 6:55 p.m.

[15] Cell phone records for Richard Oland's iPhone reveal that at 6:44 p.m., about the same time that Dennis Oland was at the Renforth Wharf, a text message sent by Diana Sedlacek caused Richard Oland's missing iPhone to connect to (or "ping") a cellular tower identified as "SJFV", located in the Rothesay area (the "Fairvale Tower").

[16] After leaving the Renforth Wharf, Dennis Oland arrived home some time prior to 7:24 p.m. Once home, Dennis Oland went upstairs and changed into blue cargo shorts, a blue golf shirt and sandals. He did not see his wife in the house and went out to the garden looking for her. There were several telephone exchanges, including voicemails, between Dennis Oland and his wife between 7:24 and 7:28 p.m. which he explained as their attempts to locate each other at home. Eventually Dennis Oland spoke to his wife on the phone and learned that she had been asleep in the sun room. After connecting with each other, Dennis and Lisa Oland headed off to get some cold medication and some food. Video surveillance footage shows them at the Kennebecasis Drug Store at 7:38 p.m. A few minutes later, they are captured on video at Cochran's

Food Market where Dennis Oland is seen chatting with his aunt Jane (Richard Oland's sister).

[17] Sometime in the early evening, Dennis Oland called his uncle Jack Connell (Jack Connell testified that he thought it was between 7:30 and 7:45 p.m.) to tell him he had picked up the Logbook and would drop it off the next morning. Between 9:20 and 9:40 p.m., Dennis Oland had two telephone conversations with Mary Beth Watt. Ms. Watt co-owned the boat, *Loki*, with Lisa Oland. Dennis Oland had spoken to Ms. Watt earlier that day concerning problems with the throttle cable on the boat, and these two calls were in relation to that issue. Dennis Oland testified that he advised Ms. Watt that he would fix the problem before the weekend. At approximately 10:00 p.m., there was an exchange of texts between Dennis Oland and the father of one of his daughter's friends concerning a weekend trip his daughter had planned to make. Dennis Oland testified that at dark he put his hens away and then he and his wife started to watch a movie. During the movie Dennis Oland went to the Marr Road Irving to buy two jugs of milk. Video surveillance from the Marr Road Irving confirms that he was there at 10:32 p.m.

[18] On Wednesday, July 7, Maureen Adamson reported to work at her usual time—between 8:45 and 9:00 a.m. Unusually, the front door was not locked. She ascended the stairs and noticed that the second-floor door to the hallway was not completely shut. As she opened the door to the inner office, she was struck by a vile odour. The air conditioner and television were still on. Ms. Adamson noticed legs by

Richard Oland's desk. She retreated from the office and went downstairs to the offices of Printing Plus where she met Preston Chiasson. Together, Ms. Adamson and Mr. Chiasson re-entered the FEC offices. The body of Richard Oland was lying face down in a pool of blood. Mr. Chiasson called 911. At 8:50 a.m., members of the Saint John Police Force ("SJPF") arrived on the scene. For the remainder of the day, various members of SJPF entered in and out of the crime scene. Sgt. Mark Smith began his forensic examination, Richard Oland's body was removed and various items, including Richard Oland's office computers, were seized by police.

[19] On July 7 at 8:55 a.m., Robert McFadden, planning to go to work as usual at FEC, was parking his car at the cruise ship terminal (his usual parking place) when he received a call from Maureen Adamson. She advised him that something had happened to Richard Oland and not to go upstairs to the FEC office but instead to meet her at Printing Plus on the ground floor. Mr. McFadden went to Printing Plus, later gave a statement to police at the station and had coffee at Tim Horton's with Ms. Adamson. While having coffee with Ms. Adamson, Mr. McFadden received a call at 12:30 p.m. from Constance Oland. Although he had been instructed by the police "not to say anything", Robert McFadden conveyed the message to Constance Oland that Richard Oland was dead.

[20] Meanwhile on July 7, Dennis Oland testified that his day began at 7:00 a.m. He first dropped the Logbook off at his mother's house by leaving it inside the side door on a radiator (confirmed by Jack Connell). He then went looking for parts to fix the throttle issue on the *Loki* discussed earlier with Mary Beth Watt. Dennis Oland is seen

on surveillance video arriving at Kent Building Supplies on Consumers Drive at 8:08 a.m., where he testified that he bought cable ties and connector clamps to "jerry rig" the throttle. A receipt from Kent (Ex. D-109) shows a purchase at 8:24 a.m. He then went to the Estey Group on City Road to pick up a sail cover for the *Loki* which he paid for using his Visa card (Visa receipt, Ex. D-110). According to his testimony, Dennis Oland went to his office at Wood Gundy to work on a website project but then decided to go do some work on the *Loki* and left the office at approximately 10:30 a.m. (see Ex. D-111).

[21] After the discovery of Richard Oland's body, the SJPF began a homicide investigation. As part of that investigation members of Richard Oland's family were requested to attend at the police station and provide recorded statements to the police. All agreed. Dennis Oland's police interview began at 6:00 p.m. on July 7. In the course of that interview, Dennis Oland discussed his relationship with his father, which he described as being very difficult at times. Dennis Oland also revealed that he had been made aware of his father's long-standing extra-marital affair with Diana Sedlacek. He also disclosed to police the financial assistance provided by his father by way of a loan to finance his 2009 divorce from his first wife. That loan was in excess of $500,000.00. Financial evidence entered at trial documents that Dennis Oland had been living beyond his means for several years. By July 6 he was in considerable financial distress.

[22] In the course of his police interview, Dennis Oland also described what he was wearing when he visited his father on July 6. He said that he had been wearing the same pants and shoes that he was wearing during the interview, a dress shirt and a blue

blazer. In fact, Dennis Oland had not worn a blue blazer but, rather, a brown Hugo Boss sports jacket (the "Brown Jacket"). The morning following his police interview, the Brown Jacket, together with various other articles of clothing, was taken to VIP Dry Cleaners where it was dry cleaned. Subsequent forensic examination revealed that the Brown Jacket contained four blood stains. At three of those stains, a DNA profile matching that of Richard Oland was found.

[23] Subsequent investigation revealed that despite the presence of various items of value at the crime scene, such as Richard Oland's Rolex watch, the keys to his BMW, his wallet and various digital devices, only his iPhone 4 cell phone was determined to be missing. Cell phone records for Richard Oland reveal that after the 6:44 p.m. text message from Diana Sedlacek, which connected to the Fairvale Tower, several calls made by Diana Sedlacek went to voicemail and text messages sent by her to Richard Oland's cell phone number were not received. An expert witness testified at trial that the general rule is that a cell phone will connect with a cellular tower with the strongest signal, which generally is the tower closest to the cell phone. The expert evidence is that, though not impossible, it is unlikely that Richard Oland's iPhone was in uptown Saint John at the time of the 6:44 p.m. text message.

[24] There was a considerable amount of blood at the crime scene. Hundreds of blood spatters radiated from the body a full 360 degrees. In the Information to Obtain a Search Warrant ("ITO") of Dennis Oland's house and to seize the Brown Jacket and other items, the police stated under oath that the police experts (Sgt. Mark Smith and Sgt.

Brian Wentzell) were of the opinion that, given the nature and extent of the injuries, the attacker or attackers would have significant blood spatter on their person. The ITO went on to state that blood transfer would likely be found in any vehicle driven by the perpetrator after the murder. Detailed forensic examinations of Dennis Oland's car, his cell phone, the shoes he wore on the evening of July 6 and a Compliments grocery bag he carried to and from his father's office revealed absolutely no trace of blood.

[25] Two blood spatter experts testified at trial: Sgt. Brian Wentzell and Patrick Laturnus. With respect to the ITO, Sgt. Wentzell testified that he did not recall telling Sgt. Smith that the blood spatter on the perpetrator would be significant. However, he did not deny saying it. At trial, Sgt. Wentzell testified that it is possible that the assailant could have had a lot of blood spatter on him/her, but it is possible that they did not. In short, Sgt. Wentzell's evidence in that regard was that there were too many variables to give a conclusive opinion as to how much blood would be on an attacker. Patrick Laturnus, on the other hand, testified that offering an opinion regarding the expected amount of blood on an assailant in any given case requires a contextual assessment. Having regard to all of the circumstances of this case, including the number and nature of the blows delivered to Richard Oland, Mr. Laturnus was adamant that there would be significant blood on the attacker and the clothing worn by him or her. Mr. Laturnus also testified that there would be a very good possibility of finding traces of blood in a vehicle driven by the attacker after the murder. Further, if the attacker handled the Blackberry cell phone or the Compliments grocery bag, Mr. Laturnus would expect to find traces of blood on those items as well.

[26] Mr. Laturnus also testified that the weapon or weapons used in the attack on Richard Oland would be covered in blood. Despite extensive searches by the SJPF, no murder weapon has ever been located.

[27] Dennis Oland testified in his own defence. While in his statement to police Dennis Oland described making two visits to his father's office on July 6, he testified at trial that there were, in fact, three. He explained that after leaving his father's office the second time, he realized he had forgotten to retrieve the Logbook and returned to get it. Dennis Oland testified that failing to tell the police about the third visit was an oversight. Similarly, Dennis Oland testified that he was simply mistaken, and not being deceptive, when he told police he had been wearing a blue blazer when, in fact, he had been wearing the Brown Jacket when he visited his father's office on July 6.

[28] In his testimony, Dennis Oland denied killing his father. He testified that he and his father discussed family history/genealogy but neither his father's extra-marital affair nor Dennis Oland's finances were raised or discussed. Dennis Oland conceded that he had been living beyond his financial means for some time and that during the first six months of 2011 his total spending was approximately $120,000.00 while his income was approximately $34,000.00. By July 6, Dennis Oland had missed the two previous payments on the interest-free loan to his father and had failed to make the June mortgage payment on his house.

[29] The time of Richard Oland's death is a central issue in this case. If Richard Oland was killed any time after approximately 7:00 p.m., then Dennis Oland could not have been the killer. The computers in Richard Oland's office were forensically examined. Expert evidence at trial was that the last evident human interaction with these computers was at 5:47 p.m. Call detail records for Richard Oland's cell phone indicate that, subsequent to the 6:44 p.m. text message pinging off the Fairvale Tower, no further texts were received and all subsequent calls went to voicemail. On the evening of July 6, John Ainsworth and Anthony Shaw were working in the offices of Printing Plus located directly below Richard Oland's office. Both testified to hearing a loud crash followed by a series of rapid thumps. Anthony Shaw testified that he heard the noises at approximately 7:30 p.m. While in a pre-trial statement given under oath John Ainsworth placed the noises between 7:30 and 7:45 p.m., at trial he testified that he could not accurately identify the time and stated that the noises could have occurred any time between 6:00 and 8:00 p.m.

III. POSITIONS OF CROWN AND DEFENCE

A. Position of the Crown

[30] The Crown submits that the evidence in this case, when assessed in its entirety, can lead to only one logical and reasonable conclusion: Dennis Oland murdered his father. First, the Crown asserts that Richard Oland's murder was a crime of passion. Despite items of value and cash present at the crime scene nothing was stolen. The number and ferocity of the blows dealt to Richard Oland far exceeded that which was required to kill him. The Crown submits that Dennis Oland had motive to kill his father

and that the evidence establishes that Richard Oland was killed between 5:45 and 6:36 p.m., while Dennis Oland was alone with his father. Therefore, Dennis Oland had the motive and the opportunity, the exclusive opportunity, to kill Richard Oland.

[31] Regarding motive, the Crown argues that Dennis Oland had a strained and difficult relationship with his father. Richard Oland was a difficult and controlling man who was meticulous with respect to his finances and, despite his wealth, was not one to share it with his family. Richard Oland had high expectations of his son and their relationship was marked by hurtful exchanges. They were not close and not friends, and Dennis Oland found it easier to keep his distance in order to keep the peace. In short, the Crown asserts that Dennis Oland had a terribly troubled relationship with his father, certainly not what one would call a normal father and son relationship.

[32] In addition, Richard Oland had been involved in a lengthy extra-marital affair with Diana Sedlacek. Dennis Oland disapproved of the affair so strongly that he approached Richard Oland's accountant and "right hand man", Robert McFadden, to voice his concern. The Crown submits that on July 6 the affair continued to weigh very heavily on Dennis Oland.

[33] In 2009 Dennis Oland was going through a divorce from his previous wife Lesley. Richard Oland financed the divorce settlement to the tune of $538,000.00. In return, Richard Oland expected a mortgage on 58 Gondola Point Road. That was the

house that Richard Oland grew up in and was referred to throughout the trial as the "ancestral home". Other conditions for the financial assistance included a prenuptial contract signed by Mr. Oland's new wife relinquishing any claim in the ancestral home upon divorce. Richard Oland also insisted on the right of first refusal in relation to the property. The accused signed a promissory note agreeing to repay the amount advanced and was required to make interest-only payments of $1,666.67 a month. Other than the signing of the promissory note the other conditions were not satisfied.

[34] By the time Dennis Oland visited his father on July 6, he was in dire financial straits. Between January and July 6, Dennis Oland spent $86,000.00 more than his income. He had missed two payments on the interest-only loan to his father and had exceeded the $163,000.00 limit on his CIBC line of credit. This line of credit was secured by a collateral mortgage on the ancestral home, which was supposed to have been mortgaged to Richard Oland pursuant to the conditions of the divorce financial assistance. Dennis Oland bounced the most recent payment on this line of credit thereby putting the ancestral home, which Richard Oland had sought to protect, at risk.

[35] By July 6, Dennis Oland's financial situation was such that he could not meet his financial obligations and had reached such a dire state that he had nowhere else to turn except to ask his father for financial help. Richard Oland was not going to bail out his son again. The Crown submits that Dennis Oland had to kill his father to save himself from financial ruin.

[36] The Crown characterizes the three visits Dennis Oland made to 52 Canterbury Street as follows:

> First visit – hesitation;
> Second visit – confrontation;
> Third visit – murder.

On the first visit, Dennis Oland made it only to the foyer and did not enter the FEC offices or speak to anyone there. Afterward, and before the second visit, he sat in his car for 10 minutes without sending or receiving any calls or texts. Dennis Oland was hesitant to see his father and to discuss his disastrous financial situation. On the second visit, Dennis Oland, after trying to put his father in a good mood by discussing genealogy, raised the issue of his finances and a confrontation ensued. After the second visit Dennis Oland was so distracted and distraught that he wandered the wrong way on Canterbury Street, crossed over to the side of the street of his vehicle, crossed again to the FEC side of the street and then crossed again to his vehicle. He then mistakenly sent a text message meant for his wife to his sister and then turned the wrong way on a one-way street and parked in the gravel parking lot. He then visited his father for a third and final time. It was on the third visit, after the confrontation with his father over finances, that Dennis Oland returned and killed Richard Oland. It was not a robbery; it was a vicious crime of passion born of an enraged mind.

[37] By 6:36 p.m. Richard Oland was dead. There was no human interaction with his computers after Dennis Oland had arrived. Richard Oland did not respond to attempts by Diana Sedlacek to contact him by cell phone or office phone. After 6:44

p.m. no text messages were received by Richard Oland's iPhone and all phone calls went directly to voicemail. At 6:44 p.m. Richard Oland's iPhone was no longer in uptown Saint John but rather somewhere in the coverage area of the Fairvale Tower, being the same area Dennis Oland went after leaving his father's office.

[38] The Crown contends that in his statement to police on July 7, Dennis Oland lied about the jacket he was wearing when he visited his father in order to mislead police. He told police he was wearing a blue blazer when, in fact, he was wearing the Brown Jacket. The next morning, less than 10 hours after Dennis Oland's police interview, the Brown Jacket was taken to be dry cleaned in an attempt to destroy any potential evidence on that jacket. Subsequent forensic examinations found bloodstains and DNA matching that of Richard Oland on the outside of the jacket and DNA matching that of Richard Oland on the inside cuffs.

[39] Based on all the foregoing, the Crown submits that the circumstantial puzzle is complete and the only logical and reasonable inference that can be drawn is that Dennis Oland returned to his father's office a third and final time on July 6 and murdered Richard Oland.

B. Position of the Defence

[40] This is a circumstantial case. As such, in order to prove guilt beyond a reasonable doubt, the evidence placed before the Court, as a whole, must be consistent

with Dennis Oland being the killer, and it must be inconsistent with any other reasonable possibility that someone else was the killer. The Defence submits that the Crown has not placed sufficient evidence before the Court to meet the burden of proof beyond a reasonable doubt.

[41] In addition, this case is not only about the insufficiency of the evidence, but the absence of evidence. Evidence that should be present if Dennis Oland was, in fact, the killer is simply not there. No murder weapon was found and no connection of any weapon made to Dennis Oland. One would expect substantial quantities of blood to be on the killer, his clothes and his shoes. Yet that is not what the police found. Only miniscule drops of blood were found on the jacket and none was discovered on the shirt and shoes Dennis Oland was wearing. Blood from the killing also would have likely been transferred to the killer's car. None was found. There is expert evidence that there would be a good opportunity for blood to be transferred to Dennis Oland's Blackberry. None was found. If the killer had handled the grocery bag or placed the murder weapon inside of it, there would be a very good chance of finding traces of blood. None were found. Like the unexplained absence of gunshot residue on the hands of an accused shooter, this absence of evidence is telling against guilt. It is exculpatory.

[42] The inference of guilt that the Crown invites requires impermissible reasoning, requiring the trier of fact to "jump to conclusions" not supported by the evidence or to "fill in the blanks" by overlooking reasonable alternative inferences that are available from equivocal evidence. In this case, none of the items of circumstantial

evidence is such that guilt is the only reasonable inference. For example, the iPhone connection to the Fairvale Tower at 6:44 p.m. is explainable by the available inference that Richard Oland left his office with the iPhone in his possession. This inference is supported by the evidence of alcohol in Richard Oland's urine. The misstatement about the Brown Jacket is equally consistent with an innocent mistake about an insignificant detail. The dry cleaning is consistent with the family's innocent need for laundered clothing for the funeral rites. The probabilities regarding the presence of Richard Oland's bloodstains on the Brown Jacket are simply a guess given the amount of contact between father and son, Richard Oland's hearing and scalp conditions and his habit of invading others' personal space.

[43] The time of Richard Oland's death is a critical fact in this case. Anthony Shaw's evidence is that he heard noises around 7:30 p.m. coming from the area of the FEC offices. John Ainsworth said the same in his *KGB* statement, but at trial he testified that all he could swear to was that he heard the noises sometime between 6:00 and 8:00 p.m. The noises heard by Shaw and Ainsworth were consistent with the forensic evidence and were clearly connected to the murder of Richard Oland. The *KGB* statement of John Ainsworth should be accepted over his trial testimony. That statement, corroborated by the testimony of Anthony Shaw and the evidence of Gerry Lowe about seeing an unknown male leave 52 Canterbury Street about the same time, raises at least a reasonable doubt, if not an actual finding, that the murder was committed between 7:30 and 7:45 p.m. This is tantamount to an alibi because at that time Dennis Oland was in

Rothesay captured on video surveillance at the Kennebecasis Drug Store and Cochran's Food Market.

[44] In addition to the lack of evidence, the absence of evidence and the reasonable alternative inferences inconsistent with guilt, the Defence submits that the body of evidence represents a compelling circumstantial case of guilt against a different unknown individual: the person seen by Gerry Lowe leaving 52 Canterbury Street. The timing of this person's departure from 52 Canterbury Street coincides with the time that the noises were heard by Anthony Shaw and John Ainsworth. Furthermore, bloody footwear impressions, inconsistent with any footwear of Dennis Oland's, were found at the crime scene under circumstances clearly associating them with the killer.

[45] With respect to motive, the Defence submits that there is no evidence to support the Crown's contention that his father's affair with Diana Sedlacek was a matter of ongoing concern for Dennis Oland. He had a one-off conversation with Robert McFadden more than a year prior to Richard Oland's death, and there is no evidence that the matter was ever raised again. With respect to the financial motive, the Defence says that the Crown puts forward two inconsistent financial motives. First, that on his second visit to his father's office Dennis Oland raised his financial situation, asked for assistance and was denied, resulting in a confrontation. He became so enraged that he returned to his father's office a third time and killed him. Second, that he killed his father to save himself from financial ruin. The Defence says that the first financial motive is pure speculation with no evidence of a conversation or any evidence to suggest that there was

even an intention to have one. The second, that Dennis Oland murdered his father to avoid financial ruin, flounders on the fact that there is no evidence that Dennis Oland gained financially from his father's death. The Defence says that both financial motives advanced by the Crown suggest premeditation inconsistent with the Crown's theory that this was a sudden crime of passion born of an enraged mind.

[46] Finally, the Defence maintains that the SJPF mishandled the crime scene. Initially, the crime scene was not properly defined and was confined to the inner FEC offices. Consequently, other areas of interest such as the foyer, the washroom, the exits and the stairs were not processed. Furthermore, access to the inner office itself was not properly controlled and it became a virtual "tourist attraction" for police officers and others. This, together with poor practices by those required to be in the inner office, resulted in contamination of the scene. These failings increased the risk that trace evidence pointing to the real killer was lost or overlooked. This is a factor to be considered in assessing the Crown's burden of proof beyond a reasonable doubt.

IV. LEGAL PRINCIPLES

A. Essential Elements

[47] The essential elements of the offence of second degree murder, and which the Crown must prove beyond a reasonable doubt, are:

1. That Dennis Oland caused Richard Oland's death;
2. That Dennis Oland caused Richard Oland's death unlawfully; and

3. That Dennis Oland had a state of mind required for murder; that is, he either meant to kill Richard Oland or meant to cause Richard Oland bodily harm that Dennis Oland knew was likely to kill Richard Oland and was reckless whether Richard Oland died or not.

[48] The autopsy performed on Richard Oland's body revealed that he had been bludgeoned to death, having received some 40 blunt and sharp force blows to the head and six sharp defensive wounds to his hands. There can be no doubt that Richard Oland died as a result of an unlawful act. Further, as a matter of logic and common sense, there can be no doubt that whoever killed Richard Oland intended to cause his death or intended to cause bodily harm which the attacker or attackers knew was likely to result in death. In short, the second and third essential elements are established. This is not in dispute. Therefore, the only issue in this case is whether the Crown has proven beyond a reasonable doubt that it was Dennis Oland who caused Richard Oland's death.

B. Presumption of Innocence – Burden of Proof Beyond a Reasonable Doubt

[49] In every criminal case the accused is presumed innocent unless and until the Crown has proven his or her guilt beyond a reasonable doubt. These two inter-related fundamental principles—presumption of innocence and proof of guilt beyond a reasonable doubt—are the cornerstone of our criminal justice system. In *R v Lifchus,* [1997] 3 SCR 320, the Supreme Court of Canada defined this difficult concept and formulated an instruction which remains the standard today. The elements of that instruction applied to this case are set out as follows. Dennis Oland entered this trial presumed innocent of the offence with which he is charged. The burden is on the Crown

to prove his guilt beyond a reasonable doubt. A reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense that logically arises from the evidence, a contradiction or contradictions in the evidence or the lack of evidence. It is not enough for me to believe that Dennis Oland is probably or likely guilty, for that would not be proof beyond a reasonable doubt. However, I need not be satisfied with absolute certainty as to his guilt. Additional clarity was provided by the Supreme Court of Canada in *R v Starr*, [2000] 2 SCR 144, explaining that proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities. In short, before I can find Dennis Oland guilty, I must be sure that it was he that struck the blows that killed Richard Oland.

C. W.D.

[50] In this case Dennis Oland testified in his own defence. Also, a portion of the statement which he gave to police was entered into evidence. In both his *viva voce* evidence and the statement to police, Dennis Oland denied killing his father. In cases where there is such exculpatory evidence, it falls to the trier of fact to assess credibility in accordance with the guidance offered in *R v W.D.*, [1991] 1 SCR 742, at page 758. This well-known jury instruction is as follows:

> i. First, if you believe the evidence of the accused, obviously you must acquit;
>
> ii. Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit;
>
> iii. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[51] The *W.D.* instruction is an extension of and inextricably linked to the principle that the burden of proof always remains on the Crown to prove guilt beyond a reasonable doubt. The purpose of the instruction is to safeguard against triers of fact falling into the trap of a simple credibility contest: determining the case by choosing one version over the other. The instruction is meant to be an antidote against the impermissible reasoning that if the accused's evidence is disbelieved, then a guilty verdict automatically follows.

[52] The *W.D.* analysis was recently revisited by the Alberta Court of Appeal in *R v Ryon*, 2019 ABCA 36. In that case the Court addressed the objectives of the instruction and noted the confusion caused by a formulaic recitation of the wording of the original instruction. The Court offered a reformulated instruction at paragraph 51:

> [...]
>
> (i) The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown. (Subject to the caveat that this does not apply to defences, such as that found in s 16 of the *Criminal Code*, where the onus rests with the proponent of the defence.)
>
> (ii) In that context, if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit. (Subject to defences with additional elements such as an objective component discussed at para 31).
>
> (iii) While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.
>
> (iv) Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the

> Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

In my view, the approach advocated by Justice Martin in *Ryon* offers very helpful guidance.

[53] As pointed out in *Ryon*, the *W.D.* analysis applies not only to an exculpatory statement by the accused but to any exculpatory evidence, whether offered by the Crown or the Defence. In this case, it would unquestionably apply to Dennis Oland's statements to police and his *viva voce* evidence at trial. In my view, the *W.D.* analysis would also apply to the evidence of Anthony Shaw and the pre-trial sworn statement of John Ainsworth (if that statement is accepted over his *viva voce* evidence at trial). (See, in this regard, *R v Morningstar,* 2017 NBCA 39, at paras. 6-12.)

D. Circumstantial Case

[54] This case is one based entirely on circumstantial (or indirect) evidence. The Supreme Court of Canada, in *R v Villaroman*, 2016 SCC 33, set out the principles governing the approach courts must take in considering circumstantial evidence. I will refer extensively to that decision.

[55] To begin, it is important to understand the difference between direct and circumstantial evidence. Direct evidence is evidence which, if believed, resolves a matter in issue. It does not require inferential reasoning. On the other hand, circumstantial evidence is any item of evidence, testimonial or real, other than the testimony of an eye witness to the material fact, from which the trier of fact may infer the existence of a fact in issue (David Watt, *Watt's Manual of Criminal Evidence 2019* (Toronto: Thomson Reuters, 2019), at pg. 50). Circumstantial evidence, by its very nature, requires inferential reasoning.

[56] It is also critical to distinguish between inference and speculation: "[a]n inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established by evidence adduced at trial" (*R v Tsekouras*, 2017 ONCA 290, at para. 229). If there are no positive proven facts from which an inference can be drawn, there can be no inference, only impermissible speculation (Watt, at pg. 50). However, it must be noted that inferences alternative to guilt do not have to arise from proven facts nor are such alternate inferences deemed "speculative" because they arise from an absence of evidence (*Villaroman*, at paras. 35-36).

[57] Inferential reasoning carries with it the inherent risk that the trier of fact will take logical or reasoning shortcuts by "filling in the gaps" or "jumping to conclusions" to support the inference invited by the Crown (*Villaroman*, at paras. 26-30). It is, therefore, essential that the trier of fact consider inferences alternative to guilt.

These alternative inferences must be based on "logic and experience applied to the evidence or the absence of evidence, not on speculation" (*Villaroman*, at para. 37). While the Crown may need to neutralize reasonable alternative inferences, the Crown does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" (*Villaroman*, at para. 37, quoting from *R v Bagshaw*, [1972] SCR 2, at pg. 8). Alternative inferences inconsistent with guilt must be reasonable, not just possible (*Villaroman*, at para. 42).

[58] In a case such as this in which proof of guilt rests exclusively on circumstantial evidence, I must be satisfied that an inference of guilt is the only reasonable inference that the evidence permits. The issue is whether the circumstantial evidence "viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty" (*Villaroman*, at para. 38). In short, to justify a conviction, the circumstantial evidence, assessed in the light of human experience, should be such that it excludes any other reasonable alternative (*Villaroman*, at para. 41).

[59] Finally, it is important that the inferences drawn from circumstantial evidence be based on the whole of the evidence. This latter instruction is particularly germane to this case. The Defence Post-Trial Brief is seeded with invitations to view individual pieces of evidence in isolation. For example, the Defence submits that the DNA evidence found on the Brown Jacket must be proved beyond a reasonable doubt to be pre-existing transfer (see para. 24, Defence Post-Trial Brief). In my view, to adopt

this approach would be to fall into reversible error. Our Court of Appeal in *R v Oland*, 2016 NBCA 58, stated at paragraph 29:

> [...] the court must resist the temptation of engaging in a process by which it: (1) assesses probative value one item of evidence at a time; and (2) discards each item that, on its own, fails to contribute to the case for the prosecution. Indeed, while the court must consider each item of evidence, it must ultimately make a decision based upon the cumulative probative effect of all of the evidence [...]

(see also *R v Tanasichuk*, 2007 NBCA 76, at paras. 80-87)

[60] The proper, and only legally permissible, approach is succinctly stated by Justice Watt in *R v Smith*, 2016 ONCA 25, at paragraphs 81-82:

> The second principle assumes particular significance when, as here, arguments are advanced that individual items of circumstantial evidence are explicable on bases other than guilt. It is essential to keep in mind that it is the cumulative effect of all the evidence that must satisfy the criminal standard of proof, not each individual item which is merely a link in the chain of proof: *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 361; *R. v. Uhrig*, 2012 ONCA 470, at para. 13.
>
> Often, individual items of evidence adduced by the Crown examined separately lack a very strong probative value. But it is all the evidence that a trier of fact is to consider. Each item is considered in relation to the others and to the evidence as a whole. And it is all the evidence taken together, often greater than the sum of individual pieces, that is to be considered and may afford a basis for a finding of guilt: *Uhrig*, at para. 13. See also: *Côté v. The King* (1941), 77 C.C.C. 75 (S.C.C.), at p. 76.

[61] In summary, to find Dennis Oland guilty on the basis of circumstantial evidence, I must be satisfied beyond a reasonable doubt that his guilt is the only reasonable inference that can be drawn from the whole of the evidence (see *R v Burnett*, 2019 NSSC 97, at para. 18).

V. ANALYSIS AND DECISION

A. Pathology

[62] Dr. Ather Naseemuddin, a surgical pathologist, was qualified as an expert entitled to give opinion evidence as to the cause, manner and mechanisms of death, as well as the meaning of human injuries. He conducted the autopsy of Richard Oland. His findings can be summarized as follows:

a. Richard Oland was approximately 6 feet tall, weighed 192 pounds and was generally in good health;

b. Richard Oland received a combination of 45 separate "blunt force" and "sharp force" blows to his hands, neck and head;

c. Six of the 45 blows were the product of "sharp force" defensive-like injuries to the back of Richard Oland's hands. These blows broke bones in both of Richard Oland's hands. These injuries are likely related to Richard Oland trying to protect and cover the back of his head;

d. There are fewer injuries to Richard Oland's hands than to his head. This is potentially because after several blows Richard Oland was no longer able to defend himself;

e. Some of the "sharp force" injuries appear to have been made in rapid succession given that they were parallel to each other and on the same axis and same plane;

f. The blows that Richard Oland suffered to the head resulted in over a dozen fractures to the skull. Some of the fractures broke through both skull plates and into the cranium;

g. The most significant injuries suffered by Richard Oland were on the left side of his head;

h. Dr. Naseemuddin did not offer an opinion on the type of weapon or weapons that may have been used;

i. Some of the injuries suffered by Richard Oland may have been sustained while Richard Oland was low to the floor or while he was on the floor;

j. This was a vicious beating. Considerable force was required to inflict the injuries upon Richard Oland;

k. Due to the nature and number of blows sustained by Richard Oland, he would have died rapidly—he would not have survived more than a few minutes. Richard Oland would have been incapacitated almost immediately and would have died soon after.

[63] In addition to the above, Dr. Naseemuddin noted that the blunt force injuries were circular in shape and diameter and bore a faint cross-hatched pattern. He also observed a fracture of the orbital plate. Dr. Naseemuddin testified that this injury could have occurred when Richard Oland fell to the floor. On cross-examination he agreed with the suggestion that there would have been an audible sound when the skull was struck. Dr. Naseemuddin could not give an opinion as to the time of death.

B. Motive

[64] Motive is not an essential element of the offence. However, evidence that an accused had a motive to commit the offence is relevant circumstantial evidence particularly where, as here, the issue is the identity of the perpetrator (*R v Griffin*, 2009 SCC 28, at para. 60). The Crown contends that Dennis Oland had a motive to kill his father. The Crown's theory of motive has three components. First, Dennis Oland had a terribly troubled relationship with his father. Second, he disapproved of his father's lengthy extra-marital affair with Diana Sedlacek and this weighed heavily on him at the time of his father's death. Third, by the time Dennis Oland visited his father on July 6, he was in a dire financial state and had nowhere to turn but to his father if he was to avoid financial ruin. The Crown postulates that Dennis Oland asked his father for financial assistance which was refused. In a state of rage Dennis Oland bludgeoned his father to death. The Crown says that it was a crime of passion and that "it was personal".

(1) Crime of Passion

[65] Inherent in the Crown's theory of motive is their contention that Richard Oland's murder was a crime of passion. As discussed above, Richard Oland suffered a savage beating. A combination of 45 separate blunt force and sharp force blows were delivered with a force sufficient to cause over a dozen skull fractures, some of which broke through the skull plates. Richard Oland would have been incapacitated very quickly and died within a few minutes. Certainly, 45 blows were far more than would have been required to kill him.

[66] Present in the FEC office when Richard Oland's body was discovered were several computers, digital cameras, an iPad, an envelope with cash and Richard Oland's car keys, wallet and Rolex watch. The only item discovered missing was Richard Oland's iPhone. It is clear that robbery was not a motive for this crime. Given that, and the ferocity of the attack, I have no difficulty in drawing the inference that this was indeed a crime of passion.

(2) Strained Relationship

[67] In his police interview on July 7, Dennis Oland was asked by Cst. Stephen Davidson about his relationship with his father. He described a difficult relationship. Richard Oland had high expectations of his children and one can easily deduce from Dennis Oland's comments that Richard Oland was a controlling person. For example, Dennis Oland, as a financial advisor at Wood Gundy, handled some investing for his

father. A special telephone line was installed and, if Richard Oland called and the phone was not answered by the third ring, he would be upset. Dennis Oland described his professional role, *vis-à-vis* his father, as that of an "order taker".

[68] Their personal relationship was also fraught. In his police interview Dennis Oland described it as a "difficult relationship" and his father as a difficult person to get along with. Dennis Oland explained that during his teenage years his father was very hard on him, so much so that he was relieved to spend his summers away at summer camp. Dennis Oland told Cst. Davidson that in his adult years family gatherings could be unpleasant because of his father's behaviour. He recounted a specific angry outburst from his father during a Christmas dinner where Dennis Oland allowed a rum cake to flame out too early. According to Dennis Oland, this was one of those situations where everything was regimented and "you're a waiter the whole time". During his police interview Dennis Oland also mentioned that there had been many phone conversations that resulted in arguments where hurtful things were said. He also told Cst. Davidson that in recent years he hardly saw his father at all.

[69] The description Dennis Oland gave to Cst. Davidson of his relationship with his father was not entirely negative. He described how his father had "stepped up" and financed his divorce settlement. He expressed his gratitude for this financial assistance. While Dennis Oland acknowledged that his father lacked "certain social skills", he appeared to show sympathies for his father's failings as a parent. He expressed his belief, shared by his family, that his father "had some kind of spectrum

thing ...going on as he got older". He explained that his father had an even more difficult relationship with his own father. Dennis Oland described his father as a keenly intelligent person with an adventurous spirit who was "a bit of a nut...in a good way".

[70] In his trial testimony Dennis Oland expanded on his relationship with his father. He described how his father offered to buy him a car if he improved his university grades. Dennis Oland testified how his father offered him advice when he was starting his career as a financial advisor in Saint John. According to Dennis Oland's testimony, during the same period he and his children would often meet Richard Oland at Poley Mountain for lunch while skiing. Notably, he testified that, when in town, his father would often drop by to see him on Sundays and they would share a beer over conversation about politics and community events.

[71] On cross-examination the Crown suggested that Dennis Oland was painting a much rosier picture of their relationship than he did in his statement to police. In particular, the Crown pointed out that he never mentioned to police his father's Sunday visits and, in fact, told police that he rarely saw his father at all in recent years. Dennis Oland's response was that he meant that he saw his father less in recent years because his father was away a lot more.

[72] In my view, Dennis Oland's trial testimony portrayed a more positive relationship than his police statement. He conceded on cross-examination that he did not

mention the Sunday visits to police and that that information could have been helpful to them. Nevertheless, I do not accept the Crown's assertion that during his police interview his characterization of the relationship with his father was disproportionately negative. In both his statement and testimony, Dennis Oland mentioned both positive and negative aspects of the relationship.

[73] There is no doubt that father and son had a difficult relationship. The evidence suggests that Richard Oland had a demanding, controlling and difficult personality. Dennis Oland admitted that his father was not the best dad and that their relationship could have been healthier. It seems to me that Dennis Oland learned to adapt to his father's difficult personality by keeping his distance and focusing on their mutual love of genealogy as a touchstone for conflict-free communication. While the father/son relationship revealed by the evidence was not typical, I cannot say that it was so dysfunctional as to be aberrant. Human experience, and an examination of our own extended families, teaches us that many filial relationships suffer from many of the same stresses that were the hallmarks of the Oland family dynamic. It must also be noted that Richard Oland continued to maintain Dennis Oland as the co-executor of his Will. While Robert McFadden testified that revising his Will was consistently on Richard Oland's "to do" list, there is no evidence as to what changes were contemplated. In any event, Dennis Oland remained as co-executor which strongly suggests that Richard Oland had trust and confidence in his son. Maureen Adamson testified in cross-examination that, besides normal grumbling about un-returned tools or a lawnmower, she always thought that Richard and Dennis Oland got along well. She allowed, however, that she saw them

together mostly in the office. She testified that when Dennis Oland arrived at the office on July 6 it was "the same old Dennis" and that Richard Oland was quite pleased to see him that day.

[74] In my view, whatever resentments the relationship may have fostered in Dennis Oland they cannot, on their own, account for Richard Oland's murder.

(3) The Affair

[75] At the time of his death Richard Oland was involved in an affair with Diana Sedlacek that had lasted some eight years. The Crown suggests that Dennis Oland did not approve of the affair and that it weighed heavily on him when he visited his father on July 6. The Crown says that Dennis Oland's concern over the affair, coupled with his poor relationship with his father and his dire financial position, combined to fuel a verbal confrontation that escalated into the killing of Richard Oland. The evidence simply does not support the inference that the affair played any part in a potential motive. I reject the suggestion outright.

[76] Dennis Oland disclosed his knowledge of the potential affair in his police interview on July 7. In that statement he indicated that it was his sister Lisa who was primarily concerned about the affair. He told Cst. Davidson that he wasn't sure if it was true or not but he started to get concerned that people would start hearing "the story". Dennis Oland disclosed a conversation with his father's accountant and associate, Robert

McFadden, wherein Dennis asked him to tell his father that people knew about the affair and "that it should stop". Robert McFadden testified that the discussion occurred when he and Dennis Oland were dealing with the divorce settlement in the period of 2008-2009. In his testimony Robert McFadden recalled the conversation as follows:

> [I]n any event [Dennis] took the opportunity to say, "Look, I think dad's having an affair with Diana, and it's sort of getting around. You could, maybe you could mention to him to cool it, or be more discreet."
>
> I didn't particularly react to it one way or the other. Not to, to be sure that I didn't acknowledge that I knew it, or, or didn't know it. I nodded and said fine. He wasn't ... it was really a, a case of, you know, maybe you should be more discreet.

[77] The gist of Dennis Oland's conversation with Robert McFadden hardly belies a burning resentment, let alone red-eyed rage. It was a rather tepid suggestion made in a one-off, unrelated conversation at least a year and a half before the murder. There is no evidence that Dennis Oland ever discussed the matter again and there is nothing in the record to suggest that this was a matter of pressing, or any, concern to Dennis Oland when he visited his father on July 6.

(4) Dennis Oland's Finances

[78] The state of Dennis Oland's financial affairs in July of 2011 consumed a lot of time at trial. As discussed, it is a key component of the Crown's theory of the case. I do not believe it is helpful to review in detail the voluminous financial evidence. Instead, I will attempt to succinctly summarize the evidence and outline the inferences I draw from it.

[79] In 1998 the estate of Philip Oland (Richard Oland's father) was looking to sell a large parcel of land comprising 58 Gondola Point Road. That property was where Richard Oland grew up and it was referred to throughout the trial as the "ancestral home". Richard Oland encouraged his son Dennis Oland and his then wife Lesley to buy the property. However, Dennis Oland could not afford to purchase the entire parcel. An arrangement was made whereby Richard Oland purchased part of the parcel thus reducing the price on the balance of the land thereby allowing Dennis Oland to purchase the ancestral home. Later, in 2000, Dennis and Lesley Oland purchased an adjacent parcel (the "farm property") with the financial assistance of Richard Oland. Dennis Oland arranged for a mortgage loan from his father with a single yearly payment of $10,000.00. Dennis Oland testified that he missed some of those yearly payments, after which the repayment schedule would be extended by a year and the interest payment adjusted accordingly. This was corroborated by Robert McFadden. He testified that Dennis Oland missed payments in 2003, 2007 and 2008. The adjustment was made for 2003 but the latter two were left in default, no adjustments were made and it got worked out in the divorce settlement by Richard Oland taking the property as part of the financial assistance advanced in 2009.

[80] In 2009 Dennis Oland was going through a divorce from his first wife Lesley. Richard Oland took it upon himself to help his son out but did not want to be directly involved. As a result, Robert McFadden was instructed by Richard Oland to make the necessary financial arrangements. Richard Oland provided Dennis Oland with a $538,000.00 loan to allow him to conclude the divorce settlement. As part of the

arrangement, Richard Oland acquired the farm property. Robert McFadden testified that Richard Oland advanced the money on conditions that he would have a mortgage on the property, that he would have the right of first refusal and that Dennis Oland's new wife, Lisa, would sign a domestic contract releasing any interest in the property in the event of a subsequent divorce. Upon receiving independent legal advice, Lisa Oland refused to sign some of the documents. While Dennis Oland signed a promissory note for the loan amount, the other documents were never signed. Under the terms of the loan Dennis Oland was to make monthly interest-only payments of $1,666.67.

[81] The evidence discloses that Dennis Oland's financial situation deteriorated after the 2009 divorce settlement. Eric Johnson, a forensic accountant, analyzed and summarized Dennis Oland's financial and banking information. It is fair to say that it painted a bleak picture. Dennis Oland, by his own admission, was living beyond his means. His debt load continued to increase while his income declined. In the first six months of 2011, Dennis Oland had income of $34,000.00, including an $8,000.00 advance from his employer. This was his lowest income in four years. Despite that, he spent approximately $120,000.00 in the same period. He spent $86,000.00 more than he made. By July 6 he was two months behind in his interest-only payments to his father. His investments and RRSPs were exhausted. Dennis Oland's Visa card was $5,000.00 over its $27,000.00 limit and he was obligated to make a minimum payment and bring the limit into compliance. This required a payment of $3,833.51 by July 25. Dennis Oland conceded on cross-examination that this was an amount of money he did not have.

[82] On August 12, 2010, Dennis Oland opened a line of credit account at CIBC with a limit of $75,000.00. By September 9, a month later, the line of credit had almost reached its limit with a debit balance of $74,809.54. In May 2011 the credit limit was increased to $163,000.00 and by July 6 it had exceeded its limit. The June 30 payment made by the accused in the amount of $481.12 was returned "NSF". This line of credit was secured by a collateral mortgage on 58 Gondola Point Road.

[83] There are two aspects to the Crown's theory of financial motive: (1) that Dennis Oland asked his father for money when he visited his father on July 6; and (2) that Richard Oland refused to help him sending Dennis Oland into a murderous rage. There is no direct evidence to support either of these propositions. Dennis Oland denied that he raised the question of finances with his father. Maureen Adamson was the only other person to be at the FEC offices at the same time as Dennis and Richard Oland. Although she was only in their presence for a few minutes, she testified that when she left the two men were engrossed in a conversation about genealogy. Nevertheless, the Crown points to evidence of Dennis Oland's dire financial circumstances and asks the Court to infer that he would have no other choice but to ask his father for money.

[84] There is little doubt that by July 6 Dennis Oland's financial situation was bleak. However, in cross-examination Eric Johnson agreed that the accused's financial situation had been more or less that way for the preceding two years. The significant difference is that between 2009 and 2011 he had increased his debt load by almost

$200,000.00. The question is whether this factor, and at that time, placed Dennis Oland in a position where he had no choice but to approach his father for help.

[85] The Crown correctly points out, and the Defence concedes, that Dennis Oland was essentially moving debt around in order to meet his credit obligations. According to the Crown's theory, this crushing debt, coupled with Dennis Oland's irresponsible spending, came to a head on July 6 placing him in a situation where the ancestral home was at risk and where he had no other sources of credit but his father. The Defence counters by characterizing July 6 as just an ordinary day for Dennis Oland. The Defence submits that there is nothing in Dennis Oland's electronic communications on July 6 that suggest an urgent or impending financial crisis. In response the Crown points to an email exchange between Dennis Oland and his wife which suggests panic on the accused's part at not being able to find his credit card. Further, the Defence suggests that the accused's financial prospects were improving. Reference is made to Dennis Oland's testimony that he intended to increase his book of business.

[86] The Crown's suggestion that the email exchange about the credit card suggests a financial crisis on July 6 is not convincing. While there are communications between Dennis and Lisa Oland that do depict a level of financial desperation (see Ex. C-131 & 132), these occurred more than a month earlier. I dismiss as unrealistic the suggestion that Dennis Oland could extricate himself from his financial morass by simply increasing his book of business; that is a long-term plan not an immediate solution.

However, there are other factors that undermine the Crown's portrayal of a crescendo of financial pressures culminating in the desperation that led to Richard Oland's death.

[87] First, his cash flow problems were not new. Second, Dennis Oland testified that he anticipated his income would increase in August – September. This is supported by the testimony of his superior at Wood Gundy, John Travis, that typically he would expect Dennis Oland's fee and commission revenue to increase in those months. Third, the evidence of Mr. Johnson is that Dennis Oland's bank account balance in July was marginally better than it had been in the previous three months. Fourth, there is no evidence that the ancestral home was at risk of foreclosure by CIBC. Only one payment in the amount of $481.00 had been missed and there is no evidence that CIBC was considering realizing on its security.

[88] I pause to address a suggestion which seems to permeate the Crown's case, namely that Richard Oland would have been concerned about Dennis Oland's default in payment of the interest-only loan. Maureen Adamson testified that the matter of the loan did not come up with Richard Oland on July 6 nor in the three or four weeks prior thereto. Robert McFadden testified that while Richard Oland viewed the financial assistance as a loan, he was not worried about the security or about repayment of the principal. According to Mr. McFadden, if the loan never got repaid it would simply be deducted from Dennis Oland's ultimate share of his father's estate. Ms. Adamson testified that it was her job to deal with Dennis Oland regarding the loan and Richard Oland relied on her to do so. According to Ms. Adamson, Richard Oland asked about the

loan only infrequently—"once in a blue moon". Further, according to Robert McFadden's evidence, Richard Oland was not particularly concerned that the three conditions attached to the loan were never satisfied. Any suggestion by the Crown that the missed interest-only payments were known to Richard Oland and that it concerned him is not supported by the evidence.

[89] Dennis Oland was in very poor financial circumstances in July 2011. However, from the evidence outlined above I cannot infer that there was a "tipping point" in the first week of July 2011 that drove Dennis Oland to desperation. Perhaps Dennis Oland should have been more troubled by his financial plight, but the evidence of his irresponsible spending and his own testimony (which I accept on this point) is that he was not overly concerned.

[90] Even if I had drawn the inference that there was a financial crisis on July 6 that would have precipitated a cry for financial assistance from his father, there is no evidence to support the inference that Dennis Oland would have approached his father directly. In fact, the evidence is to the contrary. In his direct examination, Robert McFadden testified that between 2008 and 2009 there were several times where Dennis Oland had cashflow problems and would not have enough cash for his maintenance payments. He testified that there were a series of $5,000.00, $6,000.00 or $10,000.00 loans and perhaps one for $30,000.00. According to Mr. McFadden's testimony, when Dennis Oland was seeking financial assistance he never went to his father directly. Mr. McFadden testified that he acted as the intermediary between Dennis and Richard Oland

on financial matters and he was comfortable in that role. As discussed, it was Robert McFadden who dealt with the adjustments on the farm property mortgage and he negotiated and arranged the divorce settlement assistance.

[91] Finally, the Crown's theory is that Richard Oland refused his son's request for aid thereby igniting a murderous rage. The Crown points to several factors in support of the inference that Richard Oland would have refused the request for help. The Crown says that Richard Oland was meticulous about his finances and used computer programs to continuously monitor his investments. In his statement to police, Dennis Oland said that in the family "you don't get given stuff", and in his cross-examination at trial, he agreed that his father was not the type to "give financial assistance to just anyone". The Crown also points to the testimony of Maureen Adamson who explained that Richard Oland meticulously coded expenses to the point where his wife, Constance Oland, was required to submit expense receipts in order to receive her monthly allowance of approximately $2,000.00. The Crown also characterizes Richard Oland's takeover of the farm property discussed above as an example of his willingness to call in the interest-free loan and to repossess the ancestral home if the payments could not be made.

[92] With respect to the last point, I believe the Crown mischaracterizes the circumstances that led to Richard Oland's takeover of the farm property. Recall an adjustment was made for the first missed payment but, rather than adjust for the last two missed payments, Richard Oland agreed to take over the farm property as part of the divorce assistance package. In my view, this does not suggest a willingness to call a loan

and repossess the security. Quite the contrary. With respect to Constance Oland's accounting for expenses, on cross-examination Maureen Adamson said there was nothing oppressive about the process and Richard Oland never complained about the expenses. Mrs. Adamson could not recall any expenses ever being refused and she explained that Richard Oland "was the kind of guy that wanted to know where the money was going".

[93] In my view, the evidence is that when Dennis Oland sought financial help in the past, his father did not refuse it. Exhibit D-69 is a further example of Richard Oland's willingness to assist his son. That exhibit consists of a money order in the amount of $10,000.00 from Richard Oland to Dennis Oland dated May 2, 2000, together with a thank you note from the accused which reads, "Dad, please accept this cheque as repayment for the loan forwarded to me last month. Thank you for your help in my time of need. Dennis". In addition to the testimony of Robert McFadden with respect to prior loans referred to above, he also testified that he was not aware of a time that Richard Oland refused to help his son. I accept that Richard Oland was meticulous about his finances to the point of obsession and that money was not given away freely. However, the evidence simply does not support the inference that if Dennis Oland had asked his father for help that it would have been refused.

(5) Summary with Respect to Motive

[94] In the Crown's Post-Trial Brief, there is a statement to the effect that Dennis Oland had to kill his father to save himself from financial ruin. To the extent that

this suggests that Dennis Oland killed his father for financial gain it must be rejected. There is no evidence that Dennis Oland received any direct financial benefit from his father's death. According to Robert McFadden's testimony, Richard Oland's Will provided for a spousal trust for Connie Oland during her lifetime with the remainder divided among his children upon her death. Dennis Oland could benefit under the Will only if both his father **and** his mother were dead. Further, financial gain as the motive for murder necessarily implies premeditation. This would fly in the face of the Crown's theory that this was a crime of passion born of an enraged mind and would be inconsistent with the charge of second degree murder found in the Indictment.

[95] My assessment of the evidence does not permit me to draw the inferences which the Crown invites with respect to motive. I agree that the evidence strongly suggests that Richard Oland's murder was a crime of passion. While the relationship between Dennis Oland and his father suffered from more intense stress than is typical, I cannot infer a disharmony that can account, even in conjunction with the other factors proffered by the Crown, for the brutal killing of Richard Oland. There is nothing in the record of electronic communications or otherwise which suggests that Dennis Oland was going to speak to or confront his father about money. Nor does the record disclose the level of upset, animosity or emotional break that would justify the Crown's murderous rage theory. In my view, there is absolutely no merit to the Crown's suggestion that Richard Oland's affair with Diana Sedlacek was a matter of pressing, or any, concern to Dennis Oland when he visited his father on July 6. While the suggestion that Dennis Oland and his father had a discussion about finances that resulted in a confrontation

cannot be characterized as mere speculation, the evidence in support of that proposition is weak. Recall that Anthony Shaw and John Ainsworth heard the noises coming from the FEC offices but heard no shouting or argument. For the reasons articulated above, I am of the view that the evidence does not support the inference that Dennis Oland asked his father for financial help during the visit or that such a request was refused. In short, having considered the evidence of motive offered by the Crown in its entirety (*i.e.* the crime of passion, the filial relationship, the affair and the accused's finances), neither the individual pieces of evidence nor their cumulative effect supports the Crown's theory with respect to motive.

C. Time of Death

[96] As mentioned, the time of Richard Oland's death is critical to the determination of this case. The evidence clearly demonstrates that Dennis Oland's visits to his father's office on July 6 occurred between 5:40 and 6:36 p.m. It is also undisputed that by 7:24 p.m., Dennis Oland was at his home in Rothesay and by 7:38 p.m., he was at the Kennebecasis Drug Store also in Rothesay. If Richard Oland was killed between 5:45 and 6:36 p.m. then Dennis Oland would have had the exclusive opportunity to commit the crime, there being no evidence that anyone else was present with them during that time. If the opportunity to commit the crime belongs to the accused, to the exclusion of all others, it is potent circumstantial evidence of guilt (*R v Yebes*, [1987] 2 SCR 168, at paras. 16 and 26-28). On the other hand, if Richard Oland was killed some time after 7:00 p.m., then Dennis Oland could not have been the killer.

[97] The Crown submits that the only reasonable inference that can be drawn from the evidence is that Richard Oland was killed between 5:45 and 6:36 p.m. The Crown relies primarily on three factors in support of its submission:

(a) the lack of computer activity in the FEC offices after the accused arrived;

(b) the lack of response from Richard Oland to repeated calls and text messages and calls to his office phone; and

(c) Richard Oland's iPhone connected with the Fairvale Tower in Rothesay at 6:44 p.m. indicating the iPhone was no longer in uptown Saint John by that time.

(1) Computer Activity

[98] Three experts provided evidence with respect to the analysis of the computers located in the FEC offices: Payman Hakimian, Geoffrey Fellows and Neil Walker. All three were qualified to give opinion evidence with respect to the forensic analysis of computers and related electronic devices, including the recovery and interpretation of electronic data. Of particular interest were the three computers that were within immediate reach of Richard Oland's desk identified as PE-6 (Richard Oland's primary desktop computer), PE-7 (the top computer to the left of Richard Oland's desk) and PE-8 (the bottom computer to the left of Richard Oland's desk).

[99] Mr. Hakimian was a member of the RCMP J Division Technical Crimes Unit at the time. At the request of the SJPF he analyzed the computers seized from FEC offices on July 7. Among other things, Mr. Hakimian was asked to determine the time of last known human interaction with the computers. Geoffrey Fellows was called by the

Defence and he conducted a similar analysis. Neil Walker's mandate was more limited in scope. His examination was confined to PE-6 and he was asked whether he could determine when Richard Oland's iPhone had been disconnected.

[100] According to Mr. Fellows, forensically determining human interaction with a computer depends on the type of activity: some activities leave a forensic trace and others do not. In his evidence, Mr. Fellows gave examples of some of the actions which would leave a forensic trace: opening a web browser, navigating to a page or clicking a link, opening a document, file or program, editing or changing a document (if the changes are saved), deleting a document or file, sending an email, opening or starting a program. On the other hand, there are other actions, more limited in scope, that a user may do which would not leave a forensic trace. These include viewing an already open photo, viewing a simple static website, closing a web browser, closing most (but not all) software applications, viewing and closing an already open PDF document, scrolling through a multi-page document, minimizing or maximizing a file or application window, moving a mouse and moving icons. Mr. Walker testified that it is typically interaction with files which leaves a forensic trace of human interaction.

[101] According to Mr. Hakimian's evidence, the last known human interaction with any of the three computers was at 5:47 p.m. on PE-7 (Mr. Fellows said it was 5:37 p.m. but nothing turns on the discrepancy). Richard Oland's primary computer, PE-6, showed the last signs of human interaction at 5:39 p.m. Mr. Hakimian testified that the last "proper shutdown" of PE-6 occurred at 1:46:06 p.m. A "proper shutdown" means

that the user actively shut the computer down. It requires user interaction. The computer was then restarted at few seconds later at 1:46:51 p.m. From then until the last human interaction at 5:39 p.m., there was continuous human usage of the computer. This was confirmed by Mr. Fellows. He testified that there was continuous usage of PE-6 throughout the afternoon for, among other activities, web browsing, emailing and viewing images. In addition, at 5:47 p.m. and 6:35 p.m. respectively, two emails were received on the Outlook email account associated with PE-6. Mr. Hakimian testified that these two emails were received on PE-6 but were still marked as unread when he analyzed the computer. Mr. Hakimian testified that this indicated the computer was still connected at the time of the last email but it did not affect his opinion with respect to the last human interaction at 5:39 p.m.

[102] At 5:28 p.m., PE-6 was used to open an unknown PDF document using Adobe Acrobat Reader. The PDF document was not open on the PE-6 monitor when it was seized on July 7. Mr. Fellows testified that this indicates that the user would have closed the PDF document sometime before July 7. He testified that there is no evidence which indicates when the PDF document was closed. Approximately 10 minutes after opening the unknown PDF document, Richard Oland visited a web page called Southern Ocean Racing Conference ("sorcsailing.org"). This occurred at 5:39:53 p.m. and is the last known human interaction with PE-6.

[103] The Crown submits that the computer evidence, together with the cell phone evidence (which is discussed below) leads to the logical inference that Richard

Oland did not use his computers after 5:39 p.m. because he was dead. There are two inferences that must be drawn to give flight to the Crown submission: (1) that Richard Oland did not use his computers after Dennis Oland arrived in his office; and (2) he did not use them not because he simply chose not to but that he could not do so. The Defence submits that the evidence, properly considered, does not support the inference that Richard Oland was dead. Rather, the evidence indicates his inactivity was not unusual for him and that he behaved in the same fashion when he was very much alive.

[104] In cross-examination, the Defence suggested that Richard Oland could very well have engaged in computer activity that did not leave a forensic trace. For example, Mr. Fellows testified that the Adobe Acrobat Reader which was opened at 5:28 p.m. had to have been closed at some time before the computer had been seized on July 7. However, Mr. Fellows testified that it is impossible to tell when Adobe Acrobat Reader was closed. This is supported by the evidence of Mr. Walker who agreed that the Adobe Acrobat Reader could have been open for hours before being closed. Similarly, it is possible that Richard Oland could have kept the sorcsailing.org web page open and returned to read it later without a forensic trace. The Crown, however, points to the fact that the Firefox browser was opened and the sorcsailing.org web page visited within 10 minutes after the Adobe Acrobat Reader was opened. None of the more common computer actions, such as browsing, navigating to a web page or clicking on links, occurred. Further, subsequent forensic investigation revealed that the sorcsailing.org web page did not contain very much content and Mr. Fellows agreed that it would not take long to read the entire web page. The Crown suggests that the logical inference is that

Richard Oland finished with Adobe Acrobat Reader and closed it before moving on to the browser and the sorcsailing.org web page. This web page, in turn, was read quickly and no common computer activity occurred thereafter.

[105] While the evidence certainly supports the possibility that Richard Oland could have continued to engage in passive computer activity after 5:39 p.m., I believe the more cogent inference is that computer activity ceased at that time.

[106] Even so, the Defence urges the Court to reject the inference that the computer inactivity was because Richard Oland was dead. Rather, the Defence submits that a period of inactivity is a very reasonable possibility given his demonstrative pattern of computer usage, along with evidence that Richard Oland left his office for a period of time before his death. The latter issue relates to the level of alcohol found in Richard Oland's urine and the 6:44 p.m. text connection to the Fairvale Tower. Both of these are discussed in further detail later in this decision. As will be seen, I reject the inference that Richard Oland left the office at any time after Dennis Oland's visit.

[107] The Defence asked its expert, Mr. Fellows, to check the last evident human computer usage of PE-6, PE-7 and PE-8 for the week of Monday, June 13 to Friday, June 17. That was the last full week when Richard Oland was in the office before July 6. Mr. Fellows explained that the analysis he conducted was based on examining files and the times and dates that they were created and the time and date they were last

changed by any activity. He also explained that he reviewed a number of log files and also evidence that distinguished user activity from automatic functions. Mr. Fellows' conclusions are outlined in the Defence Post-Hearing Brief at paragraph 373:

Date	Last Evident Usage of Richard Oland's Computers		
	PE/6	**PE/7**	**PE/8**
Monday, June 13, 2011	No evident user activity	A little browsing between 18:00 - 18:30	No evident user activity
Tuesday, June 14, 2011	16:02	A little browsing at 09:00	17:00
Wednesday, June 15, 2011	15:18	15:05	Up to 16:35 – old photos
Thursday, June 16, 2011	17:44	16:00	Very busy to 11:30
Friday, June 17, 2011	No later than 17:00	Almost no activity	Up to 17:05 – old photos

[108] Robert McFadden testified that Richard Oland would normally arrive at the office at 10:00 a.m. and leave at 7:00 p.m. However, it was not unusual for him to work until 7:30 p.m. and at times they would work late nights. Mr. Fellows' evidence indicates that Richard Oland's computer usage continued past 5:45 p.m. on only one day during his last full week of work. The Defence contends that the lack of computer activity after 5:47 p.m. on July 6 is not unusual and provides no basis for an inculpatory inference.

[109] In his direct examination Mr. Fellows acknowledged that the data he had to work with was incomplete. On cross-examination he reiterated the incompleteness of the data and testified it was not entirely reliable and in some cases difficult to interpret. He explained that historical data is continuously being altered and over-written. Mr. Fellows compared the historical data to the contrail from a jet: the further one gets away from it the less clear it becomes.

[110] I accept Mr. Fellows' evidence that his opinion on this issue was based on the best available evidence; however, the evidence itself is not reliable. Mr. Fellows' testimony raises the possibility that Richard Oland's computer inactivity after 5:39 p.m. on July 6 was not unusual, but it is hardly conclusive. While I cannot accept the Defence inference that Richard Oland's computer inactivity on July 6 was not unusual, nevertheless Mr. Fellows' evidence diminishes the weight to be given to the inference the Crown invites.

[111] Implicit in the Crown's claim that Richard Oland stopped using his computers because he was dead, is the notion that, if left alone in his office, Richard Oland would be drawn to use his computers. One aspect of the evidence undermines that proposition. Recall that Dennis Oland left his father's office after the second visit shortly before 6:12 p.m. He returned for the third visit shortly after at 6:21 p.m. For approximately 10 minutes Richard Oland was alone in his office and, by the Crown's own theory, he was still alive. It is reasonable to infer that he was at or near his desk and his computers. Yet, there is no evidence that Richard Oland had any interaction with his

computers. The logical inference is that Richard Oland **chose** not to use his computers during that time. I acknowledge that this ten-minute period of inactivity is less than the hour or more that Richard Oland would have had to have been inactive after the accused left at 6:30 p.m. and the time of death proposed by the Defence (7:30 - 7:45 p.m.) Nevertheless, this evidence tends to undermine the Crown's assertion found at paragraph 296 of its Post-Trial Brief:

> It is inconceivable that Richard Oland, a man known as a techie and always on his phone, was technologically *completely* inactive after the Accused arrived. This would mean he was at his office but did not use his phone (as will be discussed below) or his computers in any way after the Accused arrives that evening.

[112] In summary, I infer from the evidence that Richard Oland had no interaction of any kind (active or passive) with his computers after 5:47 p.m. Based on the unreliability of the data upon which Mr. Fellows' historical comparison is based, I cannot draw the inference suggested by the Defence that the computer inactivity on July 6 was not unusual. In short, there is no reliable comparison evidence one way or the other. The inference that Richard Oland did not use his computers because something was amiss is the more cogent inference, but I must be cautious not to accord it undue weight given that there is some evidence that Richard Oland ignored his computers between 6:12 and 6:21 p.m., when he was still very much alive.

(2) Cell Phone Evidence

[113] The Crown submits that the cell phone evidence is probative of the time of death for two reasons: (1) the unanswered text messages and calls made to Richard

Oland's iPhone by Diana Sedlacek, and (2) the location of the cell towers the iPhone connected with on July 6. The Crown submits that the lack of communication from Richard Oland after 6:44 p.m. supports the inference that he was dead by that time. The Crown also points to the fact that the 6:44 p.m. text message caused Richard Oland's iPhone to communicate with the Fairvale Tower. The only reasonable inference to be drawn from this, the Crown suggests, is that the iPhone had been taken from Richard Oland's office by the killer. Thus, by 6:44 p.m. Richard Oland was dead. While not directly related to the time of death, the Crown submits that Richard Oland's iPhone was in the Rothesay area at 6:44 p.m. at the same time that Dennis Oland was in the same general area. The Crown suggests that this is not a coincidence and that the 6:44 p.m. text message is also probative of the issue of identity of Dennis Oland as the killer. This aspect of the evidence is discussed in more detail later.

(a) Texts and Calls by Diana Sedlacek

[114] As mentioned, the only item known to be missing from Richard Oland's office was his iPhone. The call detail record ("CDR") for Richard Oland's iPhone was entered into evidence as Exhibit C-136. Also, a Defence summary of Richard Oland's iPhone communications with Diana Sedlacek was entered into evidence as Exhibit D-61. In addition, Sylvie Gill, of Rogers Communications (Richard Oland's cell phone provider) testified as to the meaning of the CDR entries. A review of this evidence reveals the following communications on July 6, both text and calls, between Richard Oland and Diana Sedlacek*:

ORDER	TIME	TYPE	TO	FROM	COMMENTS
1	9:08 a.m.	Text	Richard Oland	Diana Sedlacek	
2	9:09 a.m.	Text	Diana Sedlacek	Richard Oland	
3	9:10 a.m.	Text	Diana Sedlacek	Richard Oland	
4	9:12 a.m.	Text	Richard Oland	Diana Sedlacek	
	9:59 a.m.	Call	Diana Sedlacek	Richard Oland	Cancelled
8	10:01 a.m.	Text	Diana Sedlacek	Richard Oland	
10	10:14 a.m.	Text	Richard Oland	Diana Sedlacek	
11	12:01 p.m.	Text	Diana Sedlacek	Richard Oland	
13	12:09 p.m.	Text	Richard Oland	Diana Sedlacek	
14	12:27 p.m.	Text	Richard Oland	Diana Sedlacek	
15	1:57 p.m.	Text	Richard Oland	Diana Sedlacek	
17	6:44 p.m.	Text	Richard Oland	Diana Sedlacek	Connects to Fairvale Tower
18	6:46 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
19	6:50 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
20	6:58 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
21	7:14:06 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
22	7:14:30 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
23	7:16 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
24	7:19:04 p.m.	Text	Richard Oland	Diana Sedlacek	Not delivered
25	7:19:05 p.m.	Text	Richard Oland	Diana Sedlacek	Not delivered
26	7:21 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
27	7:29 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
28	8:09 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
29	8:49 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
30	9:34 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
31	10:10 p.m.	Call	Richard Oland	Diana Sedlacek	Straight to voicemail
32	11:12 p.m.	Text	Richard Oland	Diana Sedlacek	Not delivered
33	11:12 p.m.	Text	Richard Oland	Diana Sedlacek	Not delivered

(* The Order numbers correspond to the numbers found in Exhibit C-136.)

[115] In addition to the calls and texts made by Ms. Sedlacek to Richard Oland's iPhone, she also made two calls to his office at 6:49 and 7:15 p.m. The calls connected and lasted three and six seconds respectively, meaning there was either a conversation or the calls went to voicemail. Ms. Sedlacek testified that she did not speak to Richard

Oland on the evening of July 6. The logical and reasonable inference is that the calls to the office went to voicemail.

[116] There is some discrepancy between the raw CDR data (Ex. C-136) and Exhibits D-61 and C-101. The CDR indicates that Ms. Sedlacek sent four texts after the 6:44 p.m. text (numbers 24, 25, 32 and 33). The other exhibits indicate only two additional texts were sent. Given the duplicate times for 24/25 and 32/33, it is logical to conclude that only two further texts were sent, at 7:19 p.m. and 11:12 p.m. respectively.

[117] The Crown points to the evidence of both Maureen Adamson and Robert McFadden to the effect that Richard Oland was attached to his iPhone, that it was his preferred method of communication and in the words of Ms. Adamson, it was his "right hand gadget". Although there might be times when Richard Oland would not respond promptly to Maureen Adamson's text messages, generally speaking, he would respond quickly. The evidence also indicates that Richard Oland and Diana Sedlacek frequently communicated by text message and cell phone calls. According to Diana Sedlacek's evidence, she and Richard Oland were having an ongoing discussion on July 6 concerning a trip they had planned for the following weekend. The implication of the Crown's submission is that, in these circumstances, it would be unusual for Richard Oland not to respond promptly to Diana Sedlacek. It raises certain questions. Why did Richard Oland not respond to Diana Sedlacek? Was the iPhone off, disabled or destroyed? Was Richard Oland avoiding Ms. Sedlacek or unable to respond?

[118] As indicated above, the last text message received by Richard Oland's iPhone was at 6:44 p.m. and the two subsequent texts at 7:19 and 11:12 p.m. were not received. The 12 calls to Richard Oland's iPhone beginning at 6:46 p.m. went to voicemail and the two calls to his office line at 6:49 and 7:15 p.m. also went to voicemail. The Crown submits that the only logical and reasonable inference that can be drawn from this evidence is that Richard Oland was dead by 6:44 p.m. and by 6:46 p.m., the killer had either turned off or destroyed the iPhone.

[119] The Defence cautions against circular reasoning and submits that the proposition that Richard Oland did not respond and therefore was dead is simply one of several cogent inferences that must be established from evidence other than the fact he did not answer. The Defence points to a pattern of delayed responses by Richard Oland to Ms. Sedlacek's communications and suggests that such evidence is at least equally consistent with an inference that Richard Oland was alive at 6:44 p.m. (and thereafter) but chose not to respond.

[120] There is evidence to support the inference invited by the accused. With respect to Richard Oland's affinity for his iPhone, Robert McFadden testified that in the months prior to his death, Richard Oland did not answer his phone as quickly as he used to. Sylvie Gill testified that all incoming calls to Richard Oland's iPhone on July 6 went to voicemail. Although this is correct, it should be noted that there were only three calls to Richard Oland's iPhone prior to 6:44 pm. (# 5, 7 and 9, Ex. C-136). On July 6 the last outgoing call from the iPhone was at 10:02 a.m. (#9) and the last outgoing text was at

12:01 p.m. There was, therefore, no communication from Richard Oland to Ms. Sedlacek for more than five hours before Dennis Oland arrived at the FEC office.

[121] The pattern of communications between Ms. Sedlacek and Richard Oland on the previous two days is also relevant and was addressed by Neil Walker in his evidence. Mr. Walker explained how Richard Oland's iPhone had been backed-up to his computer on the afternoon of July 6. The data from that back-up had been extracted and provided to SJPF in what was referred to as a "data dump". Included in that data were the communications between Ms. Sedlacek and Richard Oland on July 4 and 5 (see Ex. D-61). The iPhone communications on July 4 reveal a series of text messages and phone calls exchanged between Richard Oland and Ms. Sedlacek beginning at 11:20 a.m. and continuing into the late afternoon. There is no noticeable break in the flow of communications to that point. However, there is a text message from Diana Sedlacek at 5:56 p.m. and no response from Richard Oland for over four hours until he called her at 10:10 p.m. On July 5 there was a series of communications from Ms. Sedlacek that went unanswered. She sent text messages at 10:17 a.m., 1:25 p.m. and 3:10 p.m., along with a voicemail message at 6:35 p.m. that went unanswered. She sent a further text message at 6:35 p.m. inquiring whether Richard Oland was still at the office and another at 7:08 p.m. asking "Are U okay???". Richard Oland eventually responded by phone call at 7:37 p.m. On cross-examination, Mr. Walker agreed that the communications between Ms. Sedlacek and Richard Oland over the course of July 4 – 6 reveal a pattern of Richard Oland not promptly responding to communications from Ms. Sedlacek.

[122] Ms. Gill testified that there were five possible reasons that a call would go directly to voicemail: (1) the phone was turned off; (2) the phone lost connection to the network; (3) the phone was in airplane mode; (4) the telephone aspect was turned off; and, (5) the customer directed that calls go directly to voicemail ("do not disturb mode"). Cst. Davidson, who conducted test calls on an iPhone 4, testified that when the phone was turned off, calls would go directly to voicemail, but he did not test the other possibilities mentioned by Ms. Gill. Payman Hakimian confirmed that when an iPhone is connected to a computer it charges while it is connected. Richard Oland's iPhone had been plugged into his office computer for some period of time on the afternoon on July 6. The evidence on this point is not clear. Payman Hakimian testified that the iPhone was continuously connected between 1:39 p.m. and 4:41 p.m. Neil Walker's evidence confirms that the iPhone back-up was completed at 4:41 p.m., but on cross-examination, he testified that there was evidence of several connections and disconnections throughout the afternoon. It is not necessary for me to resolve this conflict. The evidence strongly suggests that the iPhone was connected for a considerable period of time on July 6. This evidence, together with Richard Oland's affinity for his iPhone, leads to the logical inference that the phone was likely adequately charged at the relevant times. Given Richard Oland's attachment to his iPhone, it is unlikely he would have turned it off or resorted to the do not disturb or airplane mode options. Further, the possibility that the device's battery was dead is unlikely. It is, therefore, a reasonable inference that the phone was otherwise rendered inoperable.

[123] The Crown submits that the inference that Richard Oland was simply ignoring Ms. Sedlacek is pure speculation. I disagree. As noted, there is evidence that Richard Oland did not promptly respond to Ms Sedlacek. In short, the cellphone evidence informs two competing inferences: that Richard Oland could not respond because he was dead; or, that he was alive and chose not to respond. These two competing inferences must be assessed in light of the other evidence. Given that Richard Oland was indeed dead at some point on the evening of July 6 and the other possible explanations for the lack of response (*i.e.* the phone turned off, battery not charged, etc.) are unlikely, the inference that Richard Oland was unable to respond is the stronger of the two competing inferences. While the inference that Richard Oland was alive but ignoring Ms. Sedlacek is the less cogent of the two available inferences, it nevertheless finds some support in the evidence. Accordingly, the weight to be given to the inference that the Crown invites must be tempered.

(b) Cell Tower Connections

[124] As mentioned, the last text message received by Richard Oland's iPhone was at 6:44 p.m. and registered ("pinged") on the Fairvale Tower located in Rothesay. Joseph Sadoun, a radio frequency engineer, was qualified as an expert entitled to give opinion evidence in the area of design and operation of a cellular communications network, along with the analysis and interpretation of cellular telephone records as it relates to the location and movement of cellular devices. Mr. Sadoun explained that in the field of cellular communications the general rule is that a cellphone (whether sending/receiving a text message or phone call) will connect to the tower that has the

strongest signal. This is typically the tower closest to the cellphone. Mr. Sadoun explained that it is a general rule only because there are a number of factors which can affect the manner in which the signal behaves. The physics of wave propagation means that a signal can be reflected, refracted or obstructed. As a result, elements such as terrain, land use clutter and urban/rural setting must be considered. Also, the parameters of the tower itself such as its handling capacity, height and power must be taken into account.

[125] Mr. Sadoun explained that cellular communications networks are designed to permit people in a mobile mode to have continuous communications. In their quest to design and improve their cellular networks for optimum coverage, service providers use software tools to help them understand how their cellular networks are operating and to predict the best server coverage area of towers in their networks. Mr. Sadoun used one of these software tools ("E/V Planet") to do a propagation prediction, which he explained is a prediction of the best service coverage area of a particular tower. This, in turn, is used to generate a propagation map depicting in visual format the best server coverage area for the relevant tower. Using data from the CDR for Richard Oland's iPhone indicating which towers the iPhone connected with on July 6, together with information to address the factors noted above (*i.e.* clutter, terrain, technical specifications of the towers, etc.), Mr. Sadoun prepared propagation maps depicting the best service coverage area for the identified cellular towers.

[126] Referencing the relevant propagation maps (Ex. C-142, Slides 33 and 37) Mr. Sadoun testified that a cell phone that communicated with the Fairvale Tower was most likely located in the pink area (generally speaking, the area of Rothesay). Mr. Sadoun, again referencing the relevant propagation map (Ex. C-142, Slide 30), testified that the likelihood of a cell phone located in uptown Saint John communicating with the Fairvale Tower is very small. The thrust of Mr. Sadoun's opinion is that at the time of the 6:44 p.m. text message, Richard Oland's iPhone was likely in the Rothesay area and not likely in uptown Saint John. This is potentially potent evidence against the accused. However, for several reasons, it is also evidence which must be approached with caution.

[127] First, Mr. Sadoun acknowledged that the general rule is just that – general – and that often the reality is an exception to the general rule. He agreed on cross-examination that the propagation maps do not necessarily reflect the real world all the time but rather provide "a sort of photo finish" or "an idea of what's going to happen".

[128] Second, Mr. Sadoun's opinions as to the likely location of a mobile phone based on the propagation maps proved to be wrong in several instances. For example, the propagation maps predicted that a phone located at the Renforth Wharf would connect to the Fairvale Tower approximately two kilometres away. Instead, 15 of the test calls connected with the SJLV Tower approximately 21 kilometres away. Mr. Sadoun acknowledged that, based on the propagation maps, he would have opined that it was unlikely that a phone at the Renforth Wharf would have been served by the SJLV Tower,

and he would have been wrong. There were several other examples where the propagation map predictions were not borne out by the test calls made by Cst. Davidson.

[129] Third, Mr. Sadoun testified that it is common in the cellular communications industry that, once propagation maps are completed, field testing is done to fine tune the predicted coverage areas. This is done by doing test drives and seeing what towers connect with various test calls. Mr. Sadoun agreed that test drive data helps to determine if the propagation maps are reflective of the real world. There was no test drive data available for the Saint John area.

[130] Finally, Mr. Sadoun's opinion that it was unlikely that a phone in uptown Saint John would connect to the Fairvale Tower failed to account for the fact that the Fairvale Tower was on the "neighbour list" for the Saint John Tower. The Saint John Tower is the closest tower to the FEC offices and the one that Richard Oland's iPhone connected to in all six communications made while Richard Oland was at his office during business hours on July 6. It is also the tower the propagation maps predicted would service a phone located at 52 Canterbury Street. Mr. Sadoun explained that a cell tower is programmed with a neighbour list of towers to which a cell phone can be handed off if the original tower reaches capacity or otherwise cannot deal with the call. In those circumstances the phone chooses a site based on a neighbour list. Selecting a tower as a "neighbour" is not based on proximity but rather on a host of technical requirements. The propagation maps are not generated based on neighbour lists. Rather, they simply show which cell tower offers the best signal independent of a neighbour list.

[131] On cross-examination, Mr. Sadoun acknowledged the importance of knowing the neighbour list in offering an informed opinion as to the likely or unlikely location of a cell phone based on the propagation maps. He agreed that if the Fairvale Tower was on the Saint John Tower's neighbour list then that "would very much so be significant". Mr. Sadoun testified that he asked for the neighbour list information when preparing his initial report, but was unable to obtain it. An Agreed Statement of Facts filed with the Court as Exhibit C-163 now confirms that it is highly likely that the Fairvale Tower would have been on the Saint John Tower's neighbour list on July 6. On cross-examination, Mr. Sadoun agreed that the Fairvale Tower being on the Saint John Tower's neighbour list increased the probability of a phone in uptown Saint John being serviced by the Fairvale Tower. In my view, Mr. Sadoun's opinion that it was "very unlikely" that a phone in uptown Saint John would connect to the Fairvale Tower is significantly undermined by the neighbour list evidence. How much so is indeterminate.

[132] There is one other aspect of Mr. Sadoun's testimony that undermines the confidence of this Court in his expert testimony generally. On direct examination he was asked what towers were the most likely candidates for the Saint John Tower neighbour list. The Defence objected to the question on the basis that Mr. Sadoun had no data to support such an opinion and thus any opinion would be pure speculation. The objection was sustained. On cross-examination, Mr. Sadoun conceded that, if permitted to respond, he would have opined that it was unlikely that the Fairvale Tower was on the neighbour list for the Saint John Tower. That, of course, would have been wrong. This evidence is significant for two reasons. First, it highlights that Mr. Sadoun's opinion on the matter

was clearly incorrect. Second, it demonstrates that this expert witness was prepared to offer to this Court a speculative opinion without any data to support it. Neither instills confidence in this witness.

[133] I have outlined the shortcomings of the propagation map predictions. However, Mr. Sadoun offered an opinion on the location of the iPhone which was not reliant on the propagation maps. He testified that the terrain between the Fairvale Tower and uptown Saint John is "fairly hilly" and there are a number of obstacles in terms of buildings. In addition, Mr. Sadoun testified that there are several intervening towers that could offer a better signal to a phone in uptown Saint John than the Fairvale Tower. Based on these factors, Mr. Sadoun opined that the likelihood was very small that a cell phone located in uptown Saint John would connect with the Fairvale Tower. Despite the reservations I have expressed about Mr. Sadoun's testimony in general, this opinion resonates. In order for a phone located at the FEC offices to connect with the Fairvale Tower, it would have to skip the Saint John Tower located only a few blocks away and all the intervening towers. The test calls performed by Cst. Davidson reveal that 96 test calls were made to the west of the Government Storage Garage located at approximately the eastern limits or outskirts of the City of Saint John (location 8, Ex. C-58). Of those 96 calls made west (closer to uptown Saint John) of location 8, none connected with the Fairvale Tower.

[134] I accept Mr. Sadoun's opinion that it is unlikely that a cell phone located in uptown Saint John would connect with the Fairvale Tower. However, the general rule

referred to above and the evidence in general admits of the possibility. The shortcomings of the propagation map predictions and particularly the evidence that the Fairvale Tower was on the Saint John Tower neighbour list, increase the likelihood of that possibility. It is impossible to determine the probability that a phone in uptown Saint John would connect with the Fairvale Tower. I conclude, however, that it is greater than the pessimistic probability assessment initially offered by Mr. Sadoun.

(3) Noises – Shaw, Ainsworth & *KGB* and Gerry Lowe

[135] Anthony Shaw and John Ainsworth testified that they heard noises coming from the FEC offices while they were working at Printing Plus on the ground floor of 52 Canterbury Street. Anthony Shaw testified that he heard the noises at 7:30 p.m. John Ainsworth testified that the only confident estimate of the time he heard the noises was sometime between 6:00 and 8:11 p.m. Both described the noises they heard in similar terms: a loud crash followed by a series of rapid thumps. The noises lasted only a matter of seconds and stopped. Neither Mr. Shaw nor Mr. Ainsworth heard any other noises. If the noises they heard relate to the murder of Richard Oland, then this evidence is critical to the ultimate determination of this case. As mentioned, if Richard Oland was killed between 5:45 and 6:36 p.m., then Dennis Oland would have had the exclusive opportunity to commit the crime. If he was killed some time after 7:00 p.m., then Dennis Oland could not have been the killer.

(a) The Noises

[136] Recall that John Ainsworth is the owner of 52 Canterbury Street and the owner and operator of Printing Plus on the ground floor. John Ainsworth arrived at Printing Plus at approximately 11:00 a.m. At 4:30 p.m., he began working on a project for a client in relation to a brochure. At approximately 5:00 p.m., his employee left for the day, leaving Mr. Ainsworth alone. At approximately 6:00 p.m., his friend and former Printing Plus employee, Anthony Shaw, arrived. By this time Mr. Ainsworth had run into a number of computer issues and was having difficulty progressing with the brochure project. He asked Mr. Shaw to help him and the two began working at Mr. Ainsworth's work station, which is located near the middle of the right-hand side of the south wall. Mr. Ainsworth testified that he was very focused on the project and that as soon as they would solve one problem another would arise. Mr. Shaw went outside for four or five smoke breaks, but Mr. Ainsworth testified he was too focused on the computer issues to leave at any time.

[137] Both Mr. Shaw and Mr. Ainsworth testified that at approximately 8:00 p.m. a man they described as "Middle Eastern" came into Printing Plus and asked to send a fax. Subsequent investigation confirmed that the fax was sent at 8:11 p.m. Mr. Shaw and Mr. Ainsworth continued working until approximately 9:00 p.m. when they left the premises.

[138] The noises heard by Mr. Shaw and Mr. Ainsworth have probative value only if they relate to the murder of Richard Oland. The Crown concedes that the noises heard were, in fact, noises related to the murder of Richard Oland. Indeed, the pattern of the noises is consistent with the forensic evidence of Dr. Naseemuddin. Both Mr. Shaw and Mr. Ainsworth placed the noises as emanating from the general location of Richard Oland's desk. There is nothing in the evidence that would suggest any other possible explanation for the noises. The only reasonable inference to be drawn from the evidence is that the noises heard by Mr. Shaw and Mr. Ainsworth were associated with the killing of Richard Oland. Indeed, the Crown concedes the point. In short, Mr. Shaw and Mr. Ainsworth heard the murder of Richard Oland.

(b) Anthony Shaw

[139] Anthony Shaw testified that he arrived at Printing Plus at about 6:00 p.m. on July 6 and was recruited by Mr. Ainsworth to assist him with the computer problems he was encountering. He was seated next to Mr. Ainsworth at his work station. He heard the noises described above but did not take any action. He testified that he and Mr. Ainsworth "just looked at each other" and went back to their business. He was asked what time he heard the noises. I believe it is important to reproduce his evidence both in direct and in cross-examination on the issue of the timing of the noises:

> Q. Do you know what time you heard them?
>
> A. Well, I guess the best way to describing that would be I arrived at 6:00, I left at 9:00. I know that somebody came in around 8:00 o'clock to have – he just stopped in to have a fax sent. I knew it was a while after I got there and quite a while before I left so I would guesstimate to be around 7:30.

Q. When you started your – your answer you used the word "guess", what do you mean by guess?

A. Well, it's a – it's my best guess.

[140] On cross-examination the issue of timing was addressed:

Q. And just so we're clear, you weren't involved in the investigation but Mr. Ainsworth and the police became quite clear as to what time this gentleman's fax was sent, from the first time you were questioned by the police your – your estimate of the time you heard the noises, you offered it in relation to this gentleman's visit for the fax, correct?

A. Correct.

Q. That was the goal post that you used to fix the time when you heard the noises?

A. It gave me a reference point.

[141] The Crown suggests that Mr. Shaw's evidence is unreliable in that it is just a "guesstimate". The Crown submits that the only two goal posts relied upon by Mr. Shaw in pinpointing his time estimate are the time he arrived at 6:00 p.m. and the time that they left at 9:00 p.m. and that he fixed the time of the noises at the halfway mark. I disagree. It is clear that Mr. Shaw also chose as a reference point the time that the "Middle Eastern" gentleman sent the fax at approximately 8:00 p.m. Temporally, this is much closer in time to Mr. Shaw's time estimate than either when he arrived at 6:00 p.m. or when he left at 9:00 p.m. In fact, in cross-examination he identified the sending of the fax as his reference point. Recall that the fax was sent only a half hour after the time that Mr. Shaw says he heard the noises.

[142] The Crown also makes much of the fact that Mr. Shaw's time estimate is couched in the language of a "guess". I do not put much stock in that argument. A review of Mr. Shaw's testimony reveals that he uses the term "I guess" as an idiom for "I think". For example, when asked what tenants were above Printing Plus, he said Mr. Oland's office and one other tenant "I guess". Similarly, he was describing the sounds made by a tenant in one of his buildings where there was a sound complaint from a tenant and said "I guess" he went to investigate. When asked what the loading dock at 52 Canterbury Street was for, he answered that it was mainly for Printing Plus, "but I guess for the building". While I accept that Mr. Shaw's evidence as to when he heard the noises is not given with pinpoint accuracy, I do not accept that it is a wild guess. It is reliable evidence which must be weighed and considered in light of the other evidence in drawing the most reasonable inference as to the time of Richard Oland's death.

(c) John Ainsworth & KGB

[143] On October 27 John Ainsworth gave a sworn videotaped statement to a private investigator (the "*KGB* statement"). It is not clear whether the private investigator was retained by the Defence or by the Oland family. In any event, prior to giving the *KGB* statement, Mr. Ainsworth signed a *KGB* warning wherein he solemnly affirmed that he acknowledged that the statement he was about to make could be used in evidence at trial and the failure to tell the truth could result in charges and penalties. In his *KGB* statement, Mr. Ainsworth stated that he heard the noises at approximately 7:30 to 7:45 p.m. The Crown has conceded the question of threshold reliability with respect to the *KGB* statement: the circumstances under which the statement was made provide

sufficient circumstantial guarantees of trustworthiness. The threshold admissibility having been admitted I may make substantive use of the statement, giving it the appropriate weight in light of the circumstances. This necessarily entails assessing the credibility of the *KGB* statement relative to Mr. Ainsworth's trial testimony. In short, I must determine whether I accept the *KGB* statement of Mr. Ainsworth over his in-court testimony.

[144] In *R v B(KG)*, [1993] 1 SCR 740, ("*KGB*"), the Supreme Court of Canada provided a helpful, but non-exclusive, list of some of the factors to be considered in conducting this assessment: demeanour of the witness during the statement and at trial; reasons offered for the recantation; motivation for the witness to fabricate either when giving the statement or at trial; circumstances surrounding the making of the statement and the nature of the interview; corroboration of the statement by other evidence; and, the extent to which recantation limits cross-examination (*KGB*, at para. 122).

[145] In his testimony John Ainsworth generally confirmed the evidence of Anthony Shaw with respect to the nature of the noises heard and the context within which they heard them. He explained that he was preoccupied with the computer problem he was dealing with and described his involvement as being "distracted" and "hyper-focused" on the brochure project since about 4:30 p.m. Mr. Ainsworth was asked whether there was anything unusual that he could recall of the evening of July 6. He testified that two things occurred which were unusual: somebody came in to send a fax at an unusually late time and the thumping sounds he heard on the ceiling.

[146] When asked what time he heard the noises Mr. Ainsworth had this to say:

> Q. Now, I'm going to take you back inside, the question that I'm going to ask you is are you – are you able at all to advise this court as to approximately or exactly, if you can, whatever it might be as to what time that these thumping noises you heard, what time they occurred?
>
> A. No, I'm only comfortable in saying it was from when Anthony came and the fax guy, somewhere in there.
>
> Q. So - so if I –
>
> A. To be – to feel that I'm being accurate about it, confident about it, that's all I can say. There's no pinpointing the time, there's – all the rest of it's conjecture.
>
> Q. So, I know that you mentioned the time, so if you could – those two times, but if I were to ask you like times on the clock from what time to what time you figure that it happened in between?
>
> A. Well, like I say, Anthony came around 6:00 and that guy came at 8:11, so there were kind of some benchmarks to go off of, right. Everything else is just – is nebulous as all get out.

[147] Mr. Ainsworth testified that the thumping sounds occurred before the man came in requesting the fax. He testified that, although there was a clock nearby in his office, he did not consult it when he heard the noises and did not make a specific note of the time.

[148] As mentioned, in his *KGB* statement Mr. Ainsworth placed the noises he heard at between 7:30 – 7:45 p.m. His actual answer from the transcript of the *KGB* statement bears reproducing:

> JACQUES OUELLETTE: Okay. At what time did you hear this noise?

JOHN AINSWORTH: Ah, it was approximately quarter to eight, seventy thirty, quarter to eightish. Right.

JACQUES OUELLETTE: Okay. Ah, you mentioned someone came in around that time. Who was that person?

JOHN AINSWORTH: Ah, somebody came in to get a ah, a, a fax sent. They came in I think it was around, well it was, I have it on the computer, was eight, eight elevenish and it was ah, I don't know their name, right. All I know they looked Middle Eastern to me. They had like you know certain tan colour to their skin, it struck me that they were from the Middle East.

[149] Later in the statement, Mr. Ainsworth tied the time of the noises to the time the "Middle Eastern" gentleman came in to send the fax at 8:11 p.m.:

JACQUES OUELLETTE: Mm hmm. The email the email that was sent ah after, was it was it sent, do you remember for the ah the Middle Eastern gentleman – was it sent before or after you heard that noise?

JOHN AINSWORTH: It was after; it see-, it seemed like, about half an hour after that he came in.

[150] On cross-examination, the Defence challenged John Ainsworth on the inconsistencies between his trial testimony and his *KGB* statement. Mr. Ainsworth refused to adopt his previous estimate of the time he heard the noises. He essentially repudiated his *KGB* statement. The Defence moved to have the *KGB* statement entered into evidence. The Crown consented to the threshold admissibility of Mr. Ainsworth's *KGB* statement and waived the *voir dire* with respect to the *KGB* application.

[151] During the *KGB* statement, Mr. Ainsworth was calm, direct and cooperative. His demeanour at trial was quite the contrary. Mr. Ainsworth was angry,

combative, and argumentative. In many instances he refused to answer the questions posed, and he often editorialized. He had to be directed by the Court several times to answer the question being asked. Mr. Ainsworth was uncooperative on even tangential aspects of his statement. For example, in his *KGB* statement he offered that if someone was sitting in Thandi's Restaurant facing Canterbury Street they would readily see people coming and going from 52 Canterbury Street. At trial, Mr. Ainsworth went to pains to avoid conceding this obvious point.

[152] Mr. Ainsworth was not an independent witness. At trial he displayed a clear *animus* toward the accused. When asked whether he believed Dennis Oland was guilty, he responded by asking whether he could "plead the fifth" and then reluctantly conceded that he agreed with the verdict in the first trial. He put up posts on the *Telegraph Journal* website the day of the verdict praising the jury. Two days after the Court of Appeal overturned the first verdict, Mr. Ainsworth posted a photo of a girl covered in blood, challenging the Defence argument that the killer would have had substantial blood on them and commented, "Oh what coveralls can cover up". During the course of this trial, Mr. Ainsworth contacted the Crown office suggesting it explore the possibility that the accused and his wife may have arranged for the back gate leading from the alleyway to Germain Street to remain open to facilitate the Defence video demonstration of an alternate escape route. Also during the course of this trial, he contacted the police offering information that might blunt the evidence of Gerry Lowe. Mr. Ainsworth agreed on cross-examination that he had conversations with others ("a friend or two") to the effect that he knew Dennis Oland was guilty because he owed his

father $500,000.00 and was broke, that he lied about the number of times he was on Canterbury Street and the jacket he was wearing, that the bag he was carrying had coveralls in it and the discussion of genealogy was all part of the plan. While Mr. Ainsworth bristled at the suggestion that he would not do or say anything that might assist in Dennis Oland's defence, one would be forgiven for believing otherwise. In light of this evidence, there is merit to the Defence submission that at the time that Mr. Ainsworth gave his *KGB* statement, Dennis Oland had not yet been charged and there was no motive for Mr. Ainsworth to colour his evidence in a light unfavourable to the accused. The same cannot be said by the time Mr. Ainsworth testified at this trial.

[153] The reasons offered by Mr. Ainsworth for recanting his earlier statement are simply implausible. At trial Mr. Ainsworth explained that when he initially provided a statement to police on July 7 he knew Richard Oland was dead but he thought it was from a heart attack. Mr. Ainsworth explained that providing an accurate time as to when he heard the noises was not as critical if the death was from natural causes, rather than a murder. He explained that he never really knew exactly when he heard the noises but got the 7:30 – 7:45 p.m. timeframe from Anthony Shaw and provided it to the police. Mr. Ainsworth explained that it was not until the next day that he realized that Richard Oland had been murdered and how important it was to be accurate with respect to the timing of the noises. According to Mr. Ainsworth, he and Mr. Shaw were in considerable stress that they may not have been accurate in the information they gave police about when they heard the noises. Mr. Ainsworth testified that he tried to find peace of mind in the thought that the police will "be able to tell from the autopsy".

[154] This explanation makes no sense at all. First, Anthony Shaw did not mention this conversation in his testimony. Second, when allegedly realizing the "criticalness" of his misstatement to police, one would have expected Mr. Ainsworth to immediately contact the police to correct his error. Incredibly, he did not. Finally, and most importantly, by the time Mr. Ainsworth provided his *KGB* statement he knew that Richard Oland had been murdered. Knowing this, and the "criticalness" of the information, still he repeated his initial estimate of the time he heard the noises as between 7:30 and 7:45 p.m. Mr. Ainsworth's explanation is simply not believable. Mr. Ainsworth's *KGB* statement is corroborated by the evidence of Anthony Shaw who estimated the time of the noises at 7:30 p.m. As will be discussed in more detail later, some further support for Mr. Ainsworth's *KGB* statement can be found in the evidence of Gerry Lowe.

[155] The circumstances of the giving of the *KGB* statement are another factor that may be considered in the credibility assessment. When one views the *KGB* statement it is readily apparent that it was conducted in a professional setting, the questioning was not aggressive, Mr. Ainsworth was told he could stop the interview at any time and he appeared calm and relaxed. There is no evidence of any pressure having been exerted on Mr. Ainsworth. Although during his testimony Mr. Ainsworth suggested that he was lured to the *KGB* interview under false pretenses, there is no evidence to that effect. Mr. Ainsworth's response in this regard is telling:

> I was reluctant to meet with him because I asked Bob if I was gonna be doing it for the right reason to help find the perpetrator and possibly not to help defend the perpetrator and please convince me, right, why I should go up there.

[156] The final factor outlined in *KGB* is the extent to which the recantation of the testimony limits the effectiveness of cross-examination. There was no limitation on the Crown as a result of Mr. Ainsworth's repudiation of the *KGB* statement. On cross-examination the Crown could have explored unfettered any aspect of the *KGB* statement or Mr. Ainsworth's *viva voce* testimony.

[157] While I acknowledge and appreciate Mr. Ainsworth's adamant and passionate assertion that he just does not know when he heard the noises, I cannot accept his *viva voce* evidence over the *KGB* statement. It is difficult to characterize Mr. Ainsworth's performance as a witness in charitable terms. All of the factors outlined above enhance the credibility of the *KGB* statement relative to Mr. Ainsworth's trial testimony. In short, I accept Mr. Ainsworth's *KGB* statement over his in-court testimony. It is that evidence which will be considered and weighed in relation to all of the other evidence in making my final determination in this case.

(d) Gerry Lowe

[158] Gerry Lowe testified that on a certain night in July 2011 he was at Thandi's restaurant and saw a male exiting 52 Canterbury Street. It appears from his interview with Cst. Copeland on July 8 that there was an issue as to whether what Mr. Lowe observed was on July 5 or July 6. Mr. Lowe testified that he was sitting at the bar at Thandi's where he had a view of the front of 52 Canterbury Street (see Ex. D-38). Mr. Lowe described what he saw as follows:

> Q. And tell me, again, what you saw in relation to that door the evening you're sitting at the bar at Thandi's?
>
> A. I said that I seen that – that night or anyways, I believe I seen some man, male, come out and make a left-hand turn and go towards King Street.

[159] Mr. Lowe later explained that he saw the man emerge from the door that leads to the FEC offices.

[160] On cross-examination Mr. Lowe admitted that he had no specific recollection of what date he made his observation. He could not recall what he said to the officers who interviewed him on July 7 and July 8. Mr. Lowe could not provide a detailed description of the male he saw emerging from 52 Canterbury Street.

[161] The Crown submits that Mr. Lowe's evidence should be completely disregarded as unreliable. The Crown suggests that Mr. Lowe does not know what he saw or when he saw it. I disagree in part. Mr. Lowe was quite clear in his evidence about what he saw. In cross-examination he was questioned about his observation:

> Q. And earlier in your direct examination you used the words, "I believe I seen or anyways", you really don't have a specific recollection of what you saw, do you, Mr. Lowe?
>
> A. Yes. I – I know what I seen. I seen a male come out of that door where that plaque is and make the turn towards King Street east.

[162] In my view, Gerry Lowe was very clear about what he saw but unclear on what day he saw it. In his direct examination he was able to link the date of his observations to a photo shoot which was occurring outside Thandi's restaurant. His recollection was somewhat vague but Mr. Lowe recalled there was some type of photography going on outside and the possibility it was related to advertisement. An Agreed Statement of Facts, entered as Exhibit C-161, reveals that minutes after Mr. Lowe arrived at Thandi's on July 6, a professional photographer named Scott Munn arrived there for a photo shoot commissioned by Saint John Destination Marketing Inc. and that July 6 was the only date Mr. Munn took photographs at Thandi's restaurant.

[163] Security camera footage confirms that Mr. Lowe arrived at Thandi's restaurant on July 6 at 7:40 p.m. and left at 8:35 p.m. In the video Mr. Lowe is seen accompanied by a female companion. In cross-examination, Mr. Lowe was asked whether he recalled who he was with on the night that he made his observation. He agreed that he was with a female friend.

[164] Mr. Lowe's recollection of events is murky. He has no independent recollection of the time that he arrived or left Thandi's and he could not give an accurate description of the man he saw leaving the FEC office door. Mr. Lowe was a regular patron of Thandi's having visited the restaurant hundreds of times. This, of course, makes it difficult for him to recall whether what he saw occurred on July 5, July 6 or some other night. I am satisfied that Mr. Lowe saw someone leave 52 Canterbury Street when he was at Thandi's; the issue is when he saw it.

[165] The Defence attempted to bolster the notion that Mr. Lowe's observations were made on July 6 by referring him to the fact that he went to the race track on the night he made his observations and the race from Flamboro was being broadcast. The evidence is of little value because, when he was asked on direct what track the simulcast was from, his response was "if the night in question is a Wednesday night it would have been Flamboro". Obviously, the evidence would have had value if he had responded that he recalled watching a race from Flamboro and independent evidence confirmed that the Flamboro races were broadcast only on Wednesdays. That is not the case. On cross-examination, Mr. Lowe acknowledged that he could not recall what night he made his observations.

[166] The Crown attempted to impeach Mr. Lowe's reliability on the basis that he did not recall mentioning the photo shoot to the police officers who interviewed him on July 7 and 8 and again in March 2015. In my view this is insignificant. It is perfectly understandable that a lay witness like Mr. Lowe would not think to mention some extraneous event happening outside when the focus of the police inquiries was undoubtedly on who he saw exiting 52 Canterbury Street. The reliability of Mr. Lowe's account of the photo shoot is not diminished in any way. It is cogent evidence linking the night he made his observations to July 6.

[167] Based on the video surveillance footage, one can conclude that Gerry Lowe was at Thandi's with a female companion between approximately 7:40 and 8:35 p.m. on July 6. Mr. Lowe's evidence that he was with a female companion and that he

saw a photo shoot on the night he made his observations links his observations to July 6. Given Mr. Lowe's regular patronage of Thandi's, it is understandable that he would not recall the specific night he saw the man leaving 52 Canterbury Street. However, in light of the evidence to which I just referred, I am satisfied that it is more likely than not that Mr. Lowe made his observations on July 6.

[168] As mentioned, Mr. Lowe's evidence is vague. His recollection is poor. These factors affect the reliability of Mr. Lowe's evidence. I accept that his evidence provides some support for the evidence of Mr. Shaw and the *KGB* evidence of Mr. Ainsworth that the noises were heard at approximately the time that Mr. Lowe made his observations at Thandi's. However, I must be cautious in relying on this evidence to support the Defence theory that the person Mr. Lowe saw was, in fact, Richard Oland's killer. Without substantially more evidence linking this unknown person to the crime, any theory that he is the killer is speculative. No such evidence (other than the footwear impression discussed below) was offered by the accused.

(4) Summary – Time of Death

[169] The digital evidence offered by the Crown supports its theory that the time of death occurred sometime prior to 6:44 p.m. However, the evidence is not conclusive. I have concluded that Richard Oland had no interaction of any kind with his computers after 5:47 p.m. Further, I have concluded that the lack of interaction was **probably**

because something was amiss. However, there is a reasonable possibility that Richard Oland chose to ignore his computers as he had when he was left alone earlier.

[170] Similarly, the cell phone evidence suggests that Richard Oland was likely not responding to Ms. Sedlacek's calls and texts because he was unable. However, there is reliable evidence that Richard Oland had not been prompt in responding to Ms. Sedlacek in the days prior to his death. This evidence supports the competing, but in my view, less cogent inference that he was simply ignoring Ms. Sedlacek.

[171] The cell tower connection evidence is anchored in the opinion of Mr. Sadoun. Based on the predictions depicted in the propagation maps, Mr. Sadoun opined that it was unlikely that Richard Oland's iPhone was located in uptown Saint John at the time it received the 6:44 p.m. text. Its weight is significantly diminished by the shortcomings I have identified in Mr. Sadoun's evidence. In particular, the evidence that the Fairvale Tower was on the Saint John Tower neighbour list increases the possibility that the iPhone could have connected to the Fairvale Tower.

[172] The noises heard by Anthony Shaw and John Ainsworth were the murder of Richard Oland. Anthony Shaw testified that he heard these sounds at 7:30 p.m. John Ainsworth's *KGB* evidence, which I accept, is essentially the same. Anthony Shaw gave his testimony in a straight forward manner without embellishment of any kind. I did not discern any meaningful contradictions in his testimony. Unlike Mr. Ainsworth, there is

no evidence suggesting that Mr. Shaw was preoccupied by the computer problem they were working on. He went outside for several smoke breaks. I find Mr. Shaw's evidence to be credible and reliable. I have assessed Mr. Ainsworth's evidence and accept his *KGB* testimony over his *viva voce* evidence. The times noted by Mr. Shaw and Mr. Ainsworth are essentially the same. Even Mr. Ainsworth's *viva voce* testimony does not contradict that of Mr. Shaw. Finally, some, albeit tenuous, support for the 7:30 – 8:00 p.m. timeframe can be found in the evidence of Gerry Lowe.

[173] The Crown submits that the fallible evidence of Mr. Shaw and Mr. Ainsworth must give way to the conclusive and independent digital evidence. Certainly, there is evidence that is inconsistent with Mr. Shaw's time estimate. I will go so far as to say that the other evidence may be considered more cogent. However, Mr. Shaw's testimony and the *KGB* evidence of John Ainsworth raise a serious question with respect to the time of death.

D. Did Richard Oland Leave the Office?

[174] The Defence contends that even if the iPhone was out of the office at 6:44 p.m., it was still in the possession of Richard Oland. The Defence argues that the toxicology evidence supports the inference that, at some point prior to Richard Oland's death but after Dennis Oland left him, Richard Oland consumed some alcohol. The evidence from Maureen Adamson and Mr. McFadden is that Richard Oland had not consumed any alcohol during the day and alcohol was not kept on the premises (except

for a souvenir can of Alpine which remained unopened after his death). The Defence argues that the only logical inference is that Richard Oland left the office to consume alcohol prior to his death.

[175] Dr. Albert Fraser was qualified as an expert in forensic toxicology. Dr. Fraser conducted tests on Richard Oland's bodily fluids, which included his blood, urine and vitreous humor (fluid found in the eye). According to Dr. Fraser's testimony, there was no detectable alcohol in Richard Oland's blood or vitreous humor. Dr. Fraser explained that "detectable" means if there was alcohol in the blood it was below detectable limits. Dr. Fraser's evidence is that no matter what the quantity of alcohol, even a small quantity, it could not have been consumed in the hour or so before Richard Oland's death, because it would not have had time to be eliminated from the blood below detectable limits and to be found in the urine only. Dr. Fraser explained that when alcohol is consumed it goes first into the blood, then to the vitreous humor and then finally to the consumer's urine, where it remains until it is voided. In short, the bladder is the last stop for alcohol before it is eliminated from the body.

[176] A small quantity of alcohol was detected in Richard Oland's urine. There was 23 mg of alcohol per 100 ml of blood in Richard Oland's urine. Dr. Fraser's evidence was that for the alcohol to have been fully processed through the blood (*i.e.*, below detectable limits) and only be present in the urine, alcohol consumption would have had to have been several hours prior to death. Despite vigorous cross-examination, Dr. Fraser held firm to his opinion that Richard Oland could not have consumed alcohol

in the hour or so before his death. In Dr. Fraser's opinion, if Richard Oland had consumed even a small amount of alcohol in that time period, there would have been a finding of alcohol in his blood.

[177] The Defence presented the evidence of toxicologist Dr. Joel Mayer. Dr. Mayer was provided with certain assumptions provided to him by Defence counsel and provided an opinion that the toxicology readings are consistent with Richard Oland having consumed a standard drink or a beer or a glass of wine approximately an hour before his death. On cross-examination Dr. Mayer conceded that his opinion was based on the assumptions provided to him and not upon a review of Richard Oland's actual chromatograms. In the end, Dr. Mayer conceded that he was never asked to determine when alcohol consumption took place. My understanding of the evidence is that both Dr. Fraser and Dr. Mayer never fixed a time of consumption and both agreed that the toxicology evidence is also consistent with the consumption of a larger quantity of alcohol "several hours" prior to death. Neither of the experts was asked, nor did either qualify, what "several hours" means.

[178] In my opinion, Dr. Mayer's evidence is of little assistance to the Court. It is based on assumptions that do not necessarily accord with the toxicology findings. Further, he was not asked and could not provide an opinion as to the time of consumption of alcohol. It must also be noted that there is not a scintilla of evidence to suggest that Richard Oland left the FEC offices at any time before his death. Accordingly, I find no merit to the Defence suggestion that Richard Oland left his office prior to his death.

When and in what quantity alcohol was consumed to leave the small quantity of alcohol in the bladder remains a mystery.

E. DNA and Bloodstain Analysis

[179] The Brown Jacket worn by Dennis Oland when he visited his father on July 6 was later found to have blood and DNA on it matching that of Richard Oland. The Brown Jacket, together with the evidence of time of death are, in my view, the central two pillars of the prosecution's case. The Crown submits that the blood and DNA matching Richard Oland was deposited on the jacket during the murder, thus establishing the accused as the killer. The Defence, on the other hand, submits that the stains are qualitatively and quantitatively inconsistent with the blood spatter at the crime scene and are more likely than not pre-existing blood transfer.

(1) <u>What was Found on the Jacket</u>

[180] The Brown Jacket (Ex. C-89) was seized in the course of a search by police of Dennis Oland's home on July 14. The jacket was located in the master bedroom closet among other garments such as suits, jackets, shirts and trousers. Upon seizure, the Brown Jacket was rolled and folded and placed in a paper exhibit bag and was not forensically examined until November 2011. Cst. David MacDonald systematically conducted a visual examination of the jacket, which included the use of a bright halogen light. He identified several small areas of "red blood-like stains". Cst. MacDonald also noted areas of staining inside the cuffs which he described as "diluted

staining". The jacket was then transferred to Sgt. Brian Wentzell, a bloodstain analyst with the RCMP. Sgt. Wentzell conducted a methodical "millimetre by millimetre" examination of the jacket that included the use of an infrared camera.

[181] These examinations revealed three stains on the outside of the jacket (later confirmed to be blood): two on the right sleeve, and one on the front left chest/shoulder area. These stains were referred to throughout the trial as AA, AB and AC respectively. A fourth stain located on the outside back near the bottom was not discovered by either Cst. MacDonald or Sgt. Wentzell but only later observed by RCMP lab technologists. This stain was also confirmed to be blood and was referred to as AO. Sgt. Wentzell also observed reddish stains on the inside of both the right and left cuffs. Those on the inside right cuff were identified as AD, AG, AH, AI, AJ, AK, AM and AP. Those on the inside left cuff were identified as AE and AL.

[182] The Brown Jacket was then sent to the RCMP forensic laboratory for blood and DNA testing. DNA profile samples were obtained for both Richard Oland and the accused. DNA analysis was conducted on the identified areas of the jacket to determine whether there were any DNA "matches" between the jacket samples and the known DNA profile samples. Joy Kearsey, a forensic RCMP DNA reporting scientist, was qualified as an expert in the field of DNA typing. Ms. Kearsey provided an explanation of the scientific basis and the process of DNA profiling. It is neither necessary nor helpful for me to review the technical aspects of the analysis. Ms. Kearsey explained that the DNA testing was first performed using a commercially available DNA

profiling kit called "Profiler Plus". Further testing was performed by Thomas Suzanski using an enhanced and more sensitive profiling kit called "Identifier Plus". Mr. Suzanski was also qualified as a DNA profiling expert. The results of the DNA analysis performed by Ms. Kearsey and Mr. Suzanski are set out in a document entitled "Laboratory Testing Results Chart" (Ex. C-167). A summary of the results most pertinent to this analysis is set out at paragraph 161 of the Defence Post-Trial Brief and is reproduced below:

Identifier	Location on Jacket	Analysis
AA	Outside Right Sleeve	Blood confirmed, matched the DNA of Richard Oland.
AB	Outside Right Sleeve	Blood confirmed, insufficient DNA for further processing.
AC	Outside Upper Left Chest	Blood confirmed, matched the DNA of Richard Oland.
AD, AG, AH, AI, AJ, AK, AM, AP	Inside Right Cuff	No blood identified. For areas AH and AJ, mixed profiles with the major component matching the DNA of Richard Oland (the minor component of AH matched the DNA of Dennis Oland).
AE, AL	Inside Left Cuff	No blood identified. For area AL, a mixed profile with the major component matching the DNA of Dennis Oland. The minor component matched the DNA of Richard Oland, albeit with a 1 in 40 random match probability.
AO	Outside back bottom centre near hem	Blood confirmed, matched the DNA of Richard Oland.

[183] I digress to explain how an exhibit is examined for the presence of blood. Ms. Kearsey testified that there are three steps to the process. The first step is a visual examination of the exhibit to determine whether there is any visible evidence of something that could possibly be blood. If so, then one moves on to the second step, which involves a presumptive or screening test. In this case, the screening test used was a hemastix test, which is a test to identify areas that may be of interest for further testing in the laboratory. Ms. Kearsey explained that the test is very sensitive, but it is not specific for blood. It may detect very small amounts of blood, even if it has been diluted, but it will give a positive reaction not only to blood but to several other substances. A positive result does not mean that blood is present, it just means that there is an indication that blood may be present and that further testing is warranted. If there is a positive result from the hemastix test, then the testing proceeds to the third stage, which is a hemochromogen test. This test is specific for blood but it is not specific for human blood. There are no known false positives associated with the hemochromogen test and thus the analyst can say absolutely that blood has been identified if there is a positive result. However, the hemochromogen test is susceptible to false negatives. This is because the test requires a fairly concentrated blood stain to give a positive result. Ms. Kearsey explained that if a blood stain has been laundered or diluted in some way it may not be concentrated enough to obtain a positive result, although it still may be blood.

[184] I return now to the analysis of the stains on the Brown Jacket. There were four areas where blood was confirmed: AA, AB, AC and AO. All these were on the outside of the jacket. Three of these also had DNA matching that of Richard Oland. At

stain AB there was insufficient DNA for processing. There were other areas on the inside cuffs that the Crown says are Richard Oland's blood despite a negative hemochromogen test. In particular, the Crown points to stains AH, AJ and AL. All three of these stains had a positive hemastix result and a negative hemochromogen test. In all three areas a mixed DNA profile was found. At AH and AJ, the major DNA component was that of Richard Oland and the minor component that of Dennis Oland. At AL, the major component was that of Dennis Oland.

[185] The Crown submits that despite the negative hemochromogen test this Court should infer that those three areas are bloodstains. In support of that inference, the Crown points to, among other things, the presence of reddish stains, the presence of confirmed blood on other areas of the jacket, the presence of diluted staining which suggests some form of cleaning, the dry cleaning of the jacket and the fact that DNA with Richard Oland was found both on the outside of the jacket and on the inside cuffs. The basis of the Crown's submission is that the hemochromogen test can generate false negatives if the sample has been degraded by, for example, washing or dilution. In short, the Crown argues that the negative hemochromogen test sample means that those areas may or may not be blood and that the circumstances and factors identified above point to an inference of blood. I disagree.

[186] I believe it is very dangerous to accept as blood something that the hemochromogen test has not confirmed. First, Ms. Kearsey testified that if a negative result is obtained, she cannot say it is blood but she also cannot say it is not blood.

However, Ms. Kearsey testified that the RCMP standard reporting language for a negative result is "the presence of blood was not confirmed". Second, in this case the three samples in question were subjected to two tests, neither of which confirmed the presence of blood. Recall that the hemastix test is not specific for blood. The positive hemastix results could have been the result of substances other than blood. The negative hemochromogen test may very well simply confirm that possibility. Third, the presence of DNA at a site, even in conjunction with the presence of blood at the same site, does not necessarily mean that the blood is the source of the DNA. Ms. Kearsey testified in direct examination that when there is a single source DNA profile at an identified area of blood, it is more likely that the DNA profile came from the blood and not from another bodily substance. However, that cannot be said in the case of AH, AJ and AL because there were mixed DNA profiles, not single source DNA profiles, at those sites.

[187] As mentioned above, the Crown's submission also depends in part on diluted staining, which suggests cleaning or some other form of dilution. There is no evidence that the jacket was washed or rinsed before it was dry cleaned. Sgt. Wentzell was permitted to express his view that the stain on the inside right cuff appeared to have been diluted, but he could not say what the stain was, how it became diluted or when it became diluted. Finally, the Crown refers to dry cleaning as a factor to support its inference. There is no evidence before this Court whatsoever on the effect of dry cleaning on the bloodstains, including their appearance.

[188] For the foregoing reasons I reiterate that it is dangerous to draw the inference that the stains on the inside of the cuffs, AH, AJ and AL, are blood. I will, therefore, now turn to those stains that have been confirmed to be bloodstains.

[189] As mentioned, there are four stains that are confirmed to be blood: AA, AB, AC and AO. Of those four, a single source DNA profile matching Richard Oland was found at AA, AC and AO. According to the expert evidence of Ms. Kearsey. referenced above, where blood is confirmed and a single source DNA profile is found, the source of the DNA is mostly likely the blood. The evidence supports the inference that stains AA, AC and AO are from Richard Oland's blood. Although there was insufficient DNA to confirm a DNA profile at AB, I believe it too is most likely Richard Oland's blood. Given the close proximity of AB to AA it is a logical inference that the bloodstains are related and are from the same source.

[190] The evidence clearly establishes that the four blood stains are very small. Sgt. Wentzell testified that AA, AB and AC were all less than three millimetres in size. Stain AO was less than two millimetres. Sgt. Wentzell agreed on cross-examination that they were "pretty tiny stains". The thrust of the Defence submission is that the small number of stains and their size is inconsistent with the bloody crime scene. The Defence says that if the Brown Jacket had been worn during the killing it would have a significant amount of blood spatter and that is not what the bloodstain evidence reveals.

(2) The Crime Scene

[191] The photographs entered into evidence depict a gruesome and bloody murder. As mentioned, Richard Oland suffered some 45 blows. Of those approximately 35 were head injuries inflicted by a sharp-edged weapon. Two bloodstain pattern analysts gave expert testimony: Sgt. Brian Wentzell and Patrick Laturnus. Both experts agreed that the blood spatter pattern at the crime scene was 360 degrees surrounding Richard Oland's body, with hundreds of spatters. Both also agreed that there was a semi-void in the spatter to the south of the body's location. They also agreed that the circular pattern of spatter stains in the area on and around Richard Oland's desk indicate that blood "came straight down" onto the surfaces. Finally, both experts agreed that it was a reasonable inference that the murder weapon was some sort of short-handled implement.

[192] Sgt. Wentzell gave the following opinion with respect to the amount of blood spatter he would have expected to see on the assailant: "...it's possible that they did have a lot of spatter on them but it's not – it's possible that they may not have had a lot of spatter on them as well". And in cross-examination he stated:

> Q. Can I get your concurrence that in this particular case this assailant was a perfect target for spatter?
>
> A. Yes.
>
> Q. Can I get your concurrence that there should be spatter on the assailant in this case with this evidence?
>
> A. There certainly could be.
>
> Q. Should be?
>
> A. I would expect there should be.

[193] Sgt. Wentzell's opinion that the spatter on the assailant might not necessarily be substantial is based on several considerations. While he conceded that the semi-void might mean that the attacker blocked the spatter, he testified that it also might mean that less spatter was disbursed to that area. He opined that blows struck with a sharp-edged weapon tend to disburse less blood and that the blood is more likely to disburse to the sides and may not necessarily be directed back on to the assailant. He testified that the direction of disbursement depends upon the angle at which the weapon strikes the blood source. Sgt. Wentzell described the murder as a dynamic event with both the victim and the attacker moving suggesting, I believe, that this created too many variables to confidently opine on the quantity of blood spatter on the assailant.

[194] Patrick Laturnus was far less equivocal on the question of the quantity of spatter expected to be found on the attacker. He stated quite clearly that the assailant would have a significant amount of blood on him or her:

> A. Given the – the number of blows, the – the availability of – of – of – of a lot of blood that's there, the position – the dynamic position of the deceased versus the assailant, when you take those factors into account that there's – there's evidence to show that there would be blood on the assailant and given that amount of blood and the amount of blood on – on their – on the – at the scene, there would be sufficient blood that you could easily see the blood on the assailant and, in fact, it's been discussed and I believe that – that there would be so much blood that it would be significant.

[195] Mr. Laturnus testified that the elements that predict the amount of spatter are the amount of force and the blood source. Mr. Laturnus noted that the blows were delivered with sufficient force to fracture the skull and penetrate the cranium and that the source of blood would be replenished and increased with each successive blow. While he

agreed with Sgt. Wentzell that a sharp-edged implement tends to disburse blood to the sides, he noted that Sgt. Wentzell did not account for the fact that the sharp-edged blows appeared to be delivered at both horizontal and perpendicular angles, which is a strong indication that such blows would have created spatter going in different directions. Responding to a question from the Court, Sgt. Wentzell agreed that it would be a reasonable inference that blows would have been struck at various angles.

[196] I prefer the expert evidence of Patrick Laturnus over that of Sgt. Wentzell. Of the two experts, Mr. Laturnus' qualifications are superior to those of Sgt. Wentzell. Mr. Laturnus has been a crime scene specialist since 1975 and involved in bloodstain pattern analysis from 1990 as both an investigator, an instructor and a consultant. He is the past president of the International Association of Bloodstain Pattern Analysts. In contrast, Sgt. Wentzell's career in crime scene processing appears to have begun in 2000 but with no specialized training in bloodstain pattern recognition until 2005. The Crown attempted to undermine Mr. Laturnus' opinion by putting to him in cross-examination passages from literature and professional guidelines in the field of bloodstain analysis recommending restraint in providing definitive opinions and suggesting that opinions be based on what is present at the scene and not what is expected to be present. The Crown submits that Mr. Laturnus' opinion offends these principles and that he overstepped the limits of the science of his discipline. Mr. Laturnus was adamant in his response that his opinions were, in fact, based on the evidence present at the crime scene. He went on to explain that providing opinions with respect to bloodstain evidence is contextual and,

given the evidence presented to him, he was confident in his opinions. I accept Mr. Laturnus' evidence in this regard and reject the Crown's assertion.

[197] Significantly, Sgt. Mark Smith testified that when the SJPF applied for a search warrant to search Dennis Oland's residence, he provided an opinion for use in the Information to Obtain ("ITO"). Sgt. Smith testified that the opinion he provided for the ITO was a joint opinion of both he and Sgt. Wentzell. The opinion that found its way into the ITO reads as follows: "...it is their expert opinion, after examination of the scene and photographs of the body, that given the amount of injuries and force applied, the person who created these injuries would have significant bloodstains (spatter) on their person". In his testimony, Sgt. Smith stood by his original assessment. However, when confronted with the statement attributed to him, Sgt. Wentzell testified that he did not remember using the term "significant" but did not deny that he may have said it. I find this evidence troubling. It raises concerns that Sgt. Wentzell may be retreating from a previously held opinion because subsequent forensic investigations did not bear out the police theory. At the very least, this evidence undermines Sgt. Wentzell's credibility.

[198] As mentioned, both experts agree that blows were delivered to Richard Oland while he was on the floor. Mr. Laturnus testified that the evidence clearly shows that blood spatter would have gone upward and if the assailant was bent over the body wielding a short-handled weapon such upwardly travelling spatter would hit the assailant. Sgt. Wentzell agreed that there was "some" spatter that went upward. Sgt. Wentzell also agreed that the assailant in this case was a perfect target for spatter. Having regard to the

photographic evidence, the significant quantity of spatter and its omnidirectional pattern, the logical inference that the attacker would have been bent over Richard Oland's body to deliver at least some of the blows and the confined area of the attack, I believe Mr. Laturnus' opinion that the perpetrator would have significant blood spatter on him is more consistent with the evidence.

[199] It should also be noted that there is no direct conflict between Sgt. Wentzell's opinion and that of Mr. Laturnus. Mr. Laturnus said that the attacker would have had significant blood spatter on his/her person while Sgt. Wentzell said that that may have been the case. In my view, while it is possible that the attacker did not have significant blood spatter on them, I believe the more cogent and reasonable inference is that there were significant amounts of blood spatter on the assailant.

[200] I pause to address an issue raised by the Crown. The Crown points to the evidence that there was no blood trail leading out of the FEC office and there is no evidence of a cleanup at the scene. Obviously, the killer had to leave the scene and emerge onto an uptown Saint John street in daylight. The Crown asserts that this indicates that the attacker walked out with little blood on him or her. Referring to a photograph depicting the large blood pool on the floor, Mr. Laturnus testified in cross-examination that he could not say how much blood would have been on the floor when the assailant or assailants left the office. He agreed that the pool of blood depicted is consistent with the person lying on the floor and blood flowing from the head injuries. With respect to the absence of bloody footprints, Mr. Laturnus testified that he expected

the killer to have blood on the top of the foot. However, if there was blood on the bottom of the foot and depending on the amount of blood, an impression would be left that would be stronger closer to the blood source and weaker as the footwear impressions moved away until they eventually disappeared. Mr. Laturnus described this as the "rubber stamp effect". While Mr. Laturnus testified that he would have expected to see more bloody footwear impressions he was not surprised that there were not, because he had experience with scenes where a lot of blood was visible but only a slight amount of blood had been transferred and the impressions did not go far. In my view, the absence of a bloody footwear trail does not preclude me from drawing the inference that the attacker had significant blood spatter on them. It does, however, weaken somewhat the weight to be given to the inference.

[201] As mentioned, the reasonable and logical inference I draw from the evidence is that the attacker probably had significant blood spatter on him or her. This is important as it relates to the Brown Jacket. If one would expect there to be significant blood spatter on the attacker, then the logical inference is there would be significant spatter on the jacket as well. Mr. Laturnus testified that if the Brown Jacket had been worn by the killer there would be significant blood spatter on it in such a quantity that it would be easily visible. The question then becomes whether the bloodstain evidence with respect to the Brown Jacket is consistent with it having been worn during the murder.

(3) Where is the Blood?

[202] The Defence submits that the bloodstains found on the jacket are qualitatively and quantitatively different from the blood spatter at the crime scene. Qualitatively, the Defence submits that the size and appearance of the stains are inconsistent with spatter but consistent with innocent transfer. On cross-examination, Sgt. Wentzell agreed with the suggestion that, in this case, the spatter closer to the body was larger in size than the spatter further away. As mentioned, it is a logical inference that the killer was close to the body wielding blows with a short-handled weapon. Recall that the bloodstains on the Brown Jacket are very small. The Defence suggests this evidence supports the inference that the stains on the jacket are not spatter but, rather, innocent transfer. However, neither Sgt. Wentzell nor Mr. Laturnus could opine on whether the stains on the jacket were spatter or transfer. According to the experts, the stains could be spatter, transfer or some other type of deposit.

[203] The Defence suggests there were significant opportunities for innocent transfer. Among other things, the Defence points to the evidence that Richard Oland had a history of a bleeding scalp condition, that he was a "close talker" with a tendency to grab and touch people in conversation and the frequent contact between the accused and his father. The Defence also highlights the fact that the accused and his wife moved into his parents' home for a few months while their house was being renovated. Richard Oland and his wife were travelling at the time and Dennis Oland and his wife moved into their bedroom. Dennis Oland placed his clothing in his father's closet. Essentially, the accused's clothing shared closet space with that of his father providing an opportunity for

transfer of DNA. Against this evidence of potential innocent transfer, one must consider that Ms. Sedlacek testified that Richard Oland did not have any scalp issues for at least one and a half years before his death. Dr. Naseemuddin did not note any scalp irregularities in his autopsy report. Further, a single source DNA profile matching that of Richard Oland was found at the confirmed bloodstains, strongly indicating that blood was the source of the DNA and not some other bodily substance. This alone suggests that the blood/DNA was deposited at the same time and not over a series of events. On the other hand, the absence of blood spatter on the other items of clothing worn by Dennis Oland during his visit with his father calls into question the inference that the blood on the jacket is blood spatter.

[204] In my view, the quantitative rather than the qualitative nature of the blood found on the Brown Jacket is more probative. As discussed, I accept the expert evidence of Mr. Laturnus that, if the Brown Jacket had been worn during the murder, it would have significant and visible blood spatter on it. It clearly does not. There are four "very tiny" confirmed bloodstains. The Crown suggests that the lack of blood could very well have been caused by the dry cleaning of the jacket or the potential washing of it.

[205] With respect to dry cleaning, there is a dearth of evidence as to the effect of dry cleaning on bloodstained clothing. Ms. Kearsey testified that she searched but was unable to find any relevant research on the effect of dry cleaning on bloodstains or DNA. On cross-examination she agreed that "without doing research, we really don't know what impact various kinds of cleaning have on stains and DNA". On cross-examination

Sgt. Wentzell acknowledged that this was the first case where he examined an article of clothing after it had been dry cleaned after the alleged offence. He could offer no opinion as to whether the stains on the Brown Jacket looked any different before or after the dry cleaning. Sgt. Wentzell was not in a position to tell the Court anything about whether or not the dry cleaning would have had any effect on the stains on the Brown Jacket. Mr. Laturnus testified that heat has the effect of "cooking" blood and will cause blood to attach itself to the fiber of the garment. The owners of VIP Dry Cleaning, Jinhee Choi and Steve Nam, both testified that the dry-cleaning process occurs at a very hot temperature. Mr. Nam testified that the drying part of the dry-cleaning process occurs at a temperature of between 150-160 degrees, although he could not say whether that was Celsius or Fahrenheit.

[206] The only witnesses who saw the Brown Jacket before it was dry cleaned were Jinhee Choi and Steve Nam. Mr. Nam testified that when clothes are received for dry cleaning they are carefully examined for stains, both before and after the dry cleaning. Similarly, Ms. Choi testified that the customer can point out stains but the employee who receives the clothes also examines them carefully for stains. Ms. Choi agreed that if a jacket had been brought in with lots of blood on it she would remember and added "that never happened". In summary, the evidence of Ms. Choi and Mr. Nam was that it was their practice to examine clothing for stains and that they saw no blood on the clothes that were dropped off by Lisa Oland on the morning of July 8.

[207] In his direct examination, Mr. Nam testified that regular dry cleaning without treatment might remove some stains, but others require "pre-spot". On cross-examination he testified that for bloodstains one needs to use a blood and protein stain remover. Both Mr. Nam and Ms. Choi testified that the dry-cleaning process used by VIP Dry Cleaners is more environmentally friendly and gentler than the industry standard.

[208] Based on the foregoing evidence, I cannot draw the inference that the lack of blood on the Brown Jacket is a result of the dry-cleaning process. There is no expert evidence as to the effect of dry cleaning on bloodstains or DNA other than a comment made by Mr. Laturnus that it is possible that some blood can be removed in the dry-cleaning process. However, the Crown objected to this evidence as being outside Mr. Laturnus' field of expertise. While no ruling on the objection was required, I place little weight on this evidence.

[209] In my view, the most compelling evidence on this issue is the evidence of Ms. Choi and Mr. Nam. Their evidence is that the Brown Jacket was likely examined for stains both before and after the dry-cleaning process and that no bloodstains were observed. While I appreciate that the brown colouring of the jacket may obscure the visibility of the bloodstains, Ms. Choi's evidence is that if the jacket had been covered in blood, she would have remembered it. Mr. Nam's evidence is that the dry-cleaning process will remove some stains but others, including blood, must be treated with a protein stain remover. Logically, if no stains were observed then no protein stain

remover was applied. Further, the temperature of the dry-cleaning process, based on Mr. Laturnus' evidence, may have had the effect of setting the bloodstains rather than removing them. Based on the foregoing, the inference that the dry-cleaning process removed some of the blood from the Brown Jacket is not supported by the evidence.

[210] The other possible explanation for the lack of blood offered by the Crown is that the jacket was washed prior to dry cleaning. There is scant evidence to support that inference. Recall that Sgt. Wentzell was permitted to express his view that the stain on the inside right cuff appeared to have been diluted. He testified that during his training there was a blood room where experiments were conducted using sheep's blood. After the experiments the room had to be washed down and he observed the colour change in doing so. There is no indication that Sgt. Wentzell either conducted or observed experiments on the effect of water on bloodstains in fabric. At best, his experience in this regard can be characterized as a casual observation. Recall also that Sgt. Wentzell could not say what the stain was, how it became diluted or when it became diluted. Despite this, the Crown invites me to use my "common sense" and draw the inference that the Brown Jacket had been washed prior to dry cleaning. Common sense might also lead one to conclude that if a dress sports jacket had been washed, it would have been evident to Ms. Choi and Mr. Nam. Yet they made no note of it. In my view, the inference that the jacket was washed prior to dry cleaning falls into the realm of impermissible speculation.

[211] One other possible explanation for the lack of blood is that the assailant took precautions such as donning coveralls and shoe coverings to prevent the deposit of blood spatter. There is absolutely no evidence to support such a proposition and the Crown does not advance it to explain the absence of blood on the Brown Jacket. Indeed, the taking of such precautions would necessarily imply planning and premeditation which is antithetical to the Crown's theory of the case: a crime of passion born of an enraged mind.

[212] In summary, while I agree with the Crown's assertion that the lack of significant spatter is not determinative, it clearly is relevant. The small number and size of the blood stains found on the Brown Jacket is inconsistent with the bloody crime scene and the blood spatter evidence discussed above. In my view, it is a piece of circumstantial evidence favouring the accused that can be considered, along with all the other evidence, in determining whether the Crown has proven guilt beyond a reasonable doubt.

(4) The Footwear Impression

[213] The Defence argues that two bloody footwear impressions discovered just northeast of Richard Oland's head were trace evidence left there by the real perpetrator. A subsequent footwear comparison excluded Dennis Oland's footwear as the cause of the impressions. The Defence submits that this evidence excludes Dennis Oland as the killer. The Crown, on the other hand, suggests that if the killer's footwear had been

contaminated with blood so as to leave the impression, there also would have been a similar trail leaving the FEC office and there is none. The Crown submits that the impression likely predates Richard Oland's murder and is a meaningless artifact.

[214] It is important to understand how the footwear impression was discovered. In the course of processing the crime scene on July 7, Sgt. Mark Smith took a series of photographs beginning at 11:38 a.m. These photos were taken before the application of any reagents. On July 12, Sgt. Smith returned to conduct further forensic examinations. This time, Sgt. Wentzell was with him. They sprayed the table, chairs and the floor with leucomalachite green ("LMG"). LMG is a reagent that reacts to the presence of blood and turns green. It is a presumptive test for blood but not confirmatory. Photos were taken after the LMG treatment and Sgt. Smith noticed the impression. He had a discussion with Sgt. Wentzell about it and erroneously assumed it was associated with the removal of Richard Oland's body. He believed it was a footwear impression made by Cst. Squires when he assisted in removing the body. He was wrong.

[215] In March 2014, in preparing for the preliminary inquiry in the first trial of this matter, Sgt. Smith was reviewing photographs. In comparing the photographs he took on July 7 before the body was removed to the photographs taken on July 12 after the LMG treatment, he determined that the footwear impression was present before the body was removed. Sgt. Smith conceded in cross-examination that what he had missed was important, and if he had recognized the footwear impression on July 7, he would have

taken better steps to document it. Once he recognized the impression for what it was, he took steps to see if it was linked to Dennis Oland or to police officers.

[216] Sgt. Smith put together a package of material that included photographs of suspected impressions from the scene together with photographs of shoes and impressions from footwear belonging to Dennis Oland and Cst. Squires. Impressions from several pairs of Dennis Oland's shoes, including the shoes he identified as wearing on the night he visited his father on July 6, were made. The package also included an impression of one pair of boots from Cst. Squires. Sgt. Smith sent the package to Cpl. Brian Babin of the RCMP, an expert in the identification and comparison of footwear impressions.

[217] Cpl. Babin testified and explained the process of identifying impressions suitable for comparison. He explained that there must be enough footwear characteristics and clarity to allow for a comparison. He testified that in 50% of his cases he is dealing with only partial impressions, but the process remains the same. In this case, of the seven photos of possible impressions at the scene, Cpl. Babin found only two with sufficient clarity for comparison purposes (Ex. D-91(a), No. 9901 and 9902). Cpl. Babin testified that he saw a lug pattern he believed was consistent with footwear in both photographs. Cpl. Babin compared all of the test footwear impressions with impression from the scene and was able to exclude them all as having made the impression. In short, all of the footwear seized from Dennis Oland was excluded as a possible match.

[218] The footwear impression is probative only if it can be linked to the murder. In this regard, the Crown points to the evidence of Cpl. Babin that he could not say when the footwear impression was made (it is uncertain that Cpl. Babin is qualified to give such an opinion). The Crown argues that the impression could have been made well before Richard Oland's death. However, there is evidence to suggest otherwise. Recall that the impression in question turned green when sprayed with LMG. This is at least presumptive evidence of the presence of blood.

[219] The Crown also questions whether the impression is even a **footwear** impression. They point to Cpl. Babin's testimony where he said, "They appear to be footwear but I can't say 100%. There's pattern missing, there's clarity missing. So, it's possible it was made by footwear, just possible." However, Cpl. Babin explained that in his field, an impression is labelled as "possible footwear" until a positive comparison can be made. In any event, Cpl. Babin believed the impression to have been made by footwear, and it contained sufficient clarity to enable a comparison analysis.

[220] The question then becomes who, other than the perpetrator, could have made the impression. At least 15 people entered the Far End Corporation before Sgt. Smith took his photographs at approximately 11:30 a.m. The Defence, in its Post-Trial Brief, identifies the persons who entered and their testimony with respect to where in the FEC offices they went. Based on their descriptions, the Defence says none could have made the impression. I don't share the Defence's confidence in the descriptions offered by the various people who entered the FEC inner offices. At least three of those, Cst.

Shannon and the paramedics Comeau and Wall, were very close to the body and although they testified that they were careful not to step in any blood, it is understandable if their recollections in this regard are not precise.

[221] While the Crown acknowledges that it is possible that the impression was made by Richard Oland's killer, it points to the fact that there was no bloody trail of footprints leading away from the body which they suggest there would have been had the impression been made by the killer. In support they refer to the evidence of Sgt. Wentzell which I have already discussed above in relation to the rubber stamp effect. Further, the Crown itself has pointed out that the footwear impression was faint.

[222] From the foregoing evidence, I believe the following inferences can be made. First, it is likely that the impression is a footwear impression. Further, given the LMG reaction, the impression was probably made in blood. That, in turn, suggests that the impression was made sometime between the killing of Richard Oland and 11:30 a.m. on July 7 when Sgt. Smith took his photographs. If one could be confident that none of the 15 people who entered the FEC offices before 11:30 a.m. on July 7 could have made the impression, then this would be very cogent evidence that the impression was made by the killer and that the killer was not Dennis Oland. However, I do not have that degree of confidence.

[223] I do not believe that the footwear impression evidence is as compelling as the Defence makes out. However, I do not accept the Crown's view that it should be dismissed as meaningless. The best I can make of the footwear impression is that it is a piece of circumstantial evidence that raises the possibility of an unknown assailant.

[224] This is as good a place as any to address the Defence argument that there is a body of evidence which represents a compelling circumstantial case of guilt against an unknown individual: the male seen by Gerry Lowe. This evidence consists of Gerry Lowe's testimony that he saw a male leaving 52 Canterbury Street at about the same time that Anthony Shaw and John Ainsworth say they heard the noises. The accused argues that this evidence, coupled with the footwear impression the accused says was made by the killer, makes an unassailable case that Richard Oland was killed by the male seen by Gerry Lowe, who made the noises heard by Messrs. Shaw and Ainsworth and who wore the footwear that made the footwear impression. I disagree.

[225] I have already discussed the evidence of Gerry Lowe. I concluded that substantially more evidence linking the male reportedly seen by him to the crime is needed to support the Defence theory that that person is the killer. The other evidence offered by the Defence is the bloody footwear impression. As just discussed, the footwear impression is inconclusive. At best it is evidence that raises the possibility of an unknown assailant. I simply do not accept the Defence assertion that an unassailable circumstantial case has been made against this unknown third person.

F. Physical Evidence

[226] The evidence is clear that the SJPF conducted extensive and exhaustive searches of the Renforth Wharf and surrounding area, the boat *Loki*, a canvass of Canterbury Street and the neighbourhood surrounding it and a search of Dennis Oland's home. The officers involved in those searches who testified at trial describe the care with which the searches were undertaken. For example, Cst. Copeland testified that over 30 officers were involved in the search of the residence, that they took as much time as was necessary and that he had a high level of confidence that police would have found anything related to the offence on the property. Similarly, the Renforth Wharf and surrounding area were searched by land with the assistance of a canine unit. Two separate diver searches were also performed. None of these searches revealed any physical evidence (other than the Brown Jacket discussed above) connecting Dennis Oland to Richard Oland's murder.

[227] The police also seized and analyzed computers from Richard Oland's office. Computers were seized from Dennis Oland's home and his Blackberry was examined. There was no evidence from any of these sources (which would have included the back-up of Richard Oland's iPhone) implicating Dennis Oland in the murder of his father. Also, immediately after his police interview on July 7, Dennis Oland was placed under police surveillance, which lasted until the search of his home on July 14. The surveillance revealed nothing of value to the investigation. In addition to the above searches, Dennis Oland's Volkswagen Golf, his Blackberry and a reusable grocery bag similar to the one seen in the surveillance videos was forensically examined for trace

evidence. The examination of the Volkswagen Golf was particularly thorough. Sgt. Smith testified that the examination took some 16 hours over the course of three days and included the use of alternative light sources, chemical reagents, hemastix tests and DNA swabs. Sgt. Wentzell testified that there would be a very good probability of finding trace evidence in the vehicle if the assailant had gotten into a car within minutes of the killing and the blood was still wet. Patrick Laturnus also opined that there would be traces of blood in the vehicle if the assailant had driven shortly after the attack and had not washed his hands.

[228] The expert evidence is similar with respect to both the Blackberry and the reusable grocery bag. Cst. MacDonald forensically examined the phone, which included the keypad and the battery. He agreed that if someone handled the phone with blood on their hands, the keys on the keypad would be an obvious place to examine for any signs of blood. Recall that Dennis Oland received a call from his wife at 6:36 p.m. No blood or other trace evidence was found on the Blackberry. Similarly, extensive testing of the grocery bag revealed no evidence linked to Richard Oland's murder.

[229] I digress to address an issue raised by the Crown. The Crown says that, other than the accused's own testimony, there is no way to be certain that the bag carried by the accused on July 6 was the same bag that was examined. While that may be true, the Crown has offered no evidence to suggest that it is not one and the same bag. Certainly Sgt. Smith had an expectation of recovering trace evidence from it. It is similar to the bag seen in the surveillance video. I conclude that the reusable grocery bag

examined by Sgt. Smith (Ex. C-82) is the same bag carried in to 52 Canterbury Street by Dennis Oland on July 6. For similar reasons, I also conclude that the J-Crew shirt forensically examined by Cst. MacDonald and the "Natha Studio" dress shoes forensically examined by Cst. MacDonald were the same shoes and shirt worn by Dennis Oland on his visits to 52 Canterbury Street on July 6. I note that Dennis Oland was not cross-examined by the Crown with respect to his evidence concerning the shoes he wore on July 6.

[230] The J-Crew dress shirt was examined by Cst. MacDonald on two separate occasions and was also examined by Sgt. Wentzell and tested by the RCMP lab. The results were all negative for blood and DNA. However, the shirt had been laundered prior to the forensic test and no DNA, not even that of the accused, was found on the shirt. This weakens the significance to the accused of the fact that no DNA or blood was found on the shirt.

[231] Various pairs of shoes seized from Dennis Oland's home, including the Natha Studio dress shoes worn by him on July 6, were forensically examined. The results of those examinations revealed no blood or any other evidence linking them to the crime scene. Cst. MacDonald testified that he specifically looked for any attempt at clean-up and saw no evidence that the shoes had been cleaned prior to the police seizure. Mr. Laturnus testified that he expected there would be spatter on the assailant's shoes. Cst. MacDonald agreed that the shoes contained places and canals for trace evidence of blood "to sit for the police to find".

[232] With respect to the Volkswagen Golf, the Blackberry phone and the reusable grocery bag, the Crown suggests that the lack of forensic evidence on these items should be given limited weight because Sgt. Wentzell explained that blood will transfer if it is still wet but it is unlikely to transfer in a dry state. Further, they point to the fact that Patrick Laturnus opined that blood can dry very quickly. The Crown repeats its suggestion that there was very little blood on the assailant and that it would dry quickly. For the reasons already expressed, I have found that it is likely that the assailant had considerable blood spatter on them and thus the likelihood of quick drying diminishes. Further, Patrick Laturnus testified that even if the blood had dried he would expect it to flake off and be discovered by forensic examination. Further with respect to the reusable grocery bag, it is the Crown's theory that the bag left with Dennis Oland after the second visit but did not return for the third visit when the murder occurred. In that case, the grocery bag would not have been present during the murder and would, therefore, not have any blood spatter on it. There is no video surveillance evidence with respect to Dennis Oland's third visit to 52 Canterbury Street. Accordingly, there is no evidence, other than the testimony of Dennis Oland, to either support or refute the Crown's theory. Under the Crown's theory of the murder, the murder weapon would have had to have been transported into and removed from the crime scene. If Dennis Oland was the killer, it seems to me that the reusable grocery bag would be a logical receptacle for the murder weapon and thus would likely have trace evidence on or in it.

[233] I turn finally to the Logbook. Recall that the Logbook belonged to Dennis Oland's uncle, Jack Connell, who was anxious to recover it from Richard Oland.

Maureen Adamson testified that when Dennis Oland arrived, she asked him to take the Logbook to his mother Constance Oland. She testified that she handed the Logbook to Richard Oland but she couldn't remember if he took it or if he placed it on the table. She allowed that the last place she saw it was on the table and demonstrated where that location was (see Ex. D-10). If the Logbook remained where Ms. Adamson recalled last seeing it (and was present during the killing), then it certainly would have received blood spatter. Sgt. Smith identified blood spatter stains on the surface of the table where Ms. Adamson recalled the Logbook was placed. I consider Ms. Adamson's evidence on this point rather tentative. However, even if the Logbook was not as depicted in Exhibit D-10, if it was anywhere in the vicinity of Richard Oland's desk, it most certainly would have received blood spatter. The extensive forensic examination of the Logbook revealed no blood or other trace evidence linked to Richard Oland's murder.

[234] However, the Crown's theory is that the Logbook left with Dennis Oland after the second visit and thus was not present during the murder on the third visit. Like the Crown's theory with respect to the reusable grocery bag, other than the testimony of Dennis Oland, there is no evidence as to whether it left on the second or third visit.

[235] There was an expectation that trace evidence would be found on the Volkswagen Golf, the Blackberry, the reusable grocery bag and the shoes. Yet after extensive forensic examination none was found. The physical and digital searches turned up nothing linking Dennis Oland to the murder. The Defence submits that this evidence should be present if Dennis Oland is the killer and its absence is exculpatory. I disagree.

In *R v Locke*, 2015 MBCA 73, the Manitoba Court of Appeal upheld the trial judge's finding that the absence of evidence from a substandard investigation is a neutral factor. At paragraph 45 of the trial decision (2013 MBQB 235), the trial judge stated:

> As I noted above, corroborating evidence is not necessary. However, I have considered whether a negative inference should be drawn against the Crown's case because no evidence was presented as to the results of the physical testing and because of the Crown's acknowledgement that additional testing should have been done. I expect that if the Crown had physical evidence linking the accused to the scene or the samples, it would have been presented to the court as it would have implicated the accused. **While the absence of such forensic physical evidence does not support the Crown's case, I do not accept that the absence of such forensic evidence linking the accused to the alleged offences exculpates the accused. The lack of such evidence cannot be taken to mean that the alleged incidents did not happen**. I have no basis to infer that, in the circumstances, the absence of these testing results is conclusive of anything. Ultimately, I consider the absence of the testing results to be neutral.
>
> [Emphasis added.]

[236] The absence of evidence does not support the Crown's case and can be considered in determining whether the burden of proof beyond a reasonable doubt has been met.

G. Demeanour Evidence

[237] Both the Crown and Defence have made reference to demeanour evidence and have asked me to draw certain inferences from it. There are two aspects to the Crown's reliance on demeanour evidence. First, the Crown submits that the evidence of Dennis Oland walking the wrong way on Canterbury Street, making an illegal left turn on

Princess Street and accidentally sending a message to his sister instead of his wife is evidence that the accused was distraught and distressed after a confrontation with his father. The Crown also points to a change in Dennis Oland's demeanour during his police interview on July 7. The Crown points out that during the first half of the interview the accused is relaxed, calm, talkative and even laughing. Then his demeanour changes where he becomes quiet and guarded. The Crown says that this suggests that the accused became panicked upon being asked more probing questions by Cst. Davidson. On the other hand, the Defence points to Dennis Oland's behaviour on July 6 and July 7 as being perfectly normal and completely inconsistent with someone who had committed a brutal murder. The Defence points to the fact that Dennis Oland went home and that he and his wife carried on in the ordinary course with their evening, shopping at Kennebecasis Drug and then Cochran's Market. Video surveillance shows Dennis Oland carrying on what appears to be a normal conversation with his aunt Jane, Richard Oland's sister, about an hour after he is alleged to have bludgeoned his father to death. There is independent evidence confirming that Dennis Oland spoke to Jack Connell that evening on the phone to advise him that he had picked up the Logbook and would be dropping it off and that he also spoke to Mary Beth Watt regarding fixing the throttle on the boat *Loki*. Similarly, on July 7, the Defence points to the accused's conduct as being normal and not what one would expect of someone who murdered his father the night before. Dennis Oland dropped off the Logbook to his mother's house as promised, he went to Kent Building Supplies looking for material to fix the throttle, he went to work to work on a project and then carried on to the boat *Loki* to attempt to fix the throttle.

[228] One must be very careful with this type of evidence. In my view it is a form of demeanour evidence which, the case law says, must be treated with caution (*R v Trotta* (2005), 190 CCC (3d) 199 at paras. 40 – 41; *R v Levert*, (2001), 159 CCC (3d) 71 at paras. 25-27). As mentioned in those cases, the probative value of such evidence may be more apparent than real. This assumes that there is a "normal" range of reaction to highly stressful situations that is applicable to all individuals. Second, such evidence assumes that outward appearance accurately reflects an individual's state of mind or emotional state.

[239] At first blush, the behaviour referred to by the Crown with respect to Dennis Oland's wandering around Canterbury Street could be considered the behaviour of a distraught and distressed individual. Similarly, the change in Mr. Oland's demeanour and his confusion in answering certain questions during his police interview could be considered evidence of panic or an attempt to obfuscate. On the other hand, the criss-crossing of Canterbury Street could be consistent with the innocent explanation that he parked his car at various points and that he considered and reconsidered walking to the drug store for medication. With respect to his police interview, his confusion could be attributed to the shock of losing his father that day. His change in demeanour could be a response to a shift to aggressive questioning by Cst. Davidson.

[240] The evidence highlighted by the Defence certainly seems to be more in keeping with "normal" behaviour and thus inconsistent with someone who had committed a brutal murder less than an hour earlier. However, it nonetheless requires me

to assume that Dennis Oland's outward behaviour reflects his actual state of mind. It could be that Dennis Oland is particularly adept at concealing or controlling his emotions or that he lacks empathy.

[241] While I believe the apparently normal conduct displayed by Dennis Oland in the hours after Richard Oland's murder appears inconsistent with someone who committed a brutal crime, for the reasons articulated I must be very cautious in drawing any conclusions from it. In summary, the demeanour evidence offered by both the Crown and the Defence will be given very little weight.

H. Renforth Wharf

[242] The Crown challenges the accused's assertion that he went to the Renforth Wharf for the purpose of seeing his children. The Crown contends that the likely purpose of the visit was to conceal evidence. The Crown points to the fact that, in his statement to police, he repeatedly connected kayaking lessons earlier in the day with the expectation that his children would be swimming afterwards. He was cross-examined at trial and admitted that at 5:05 p.m. he knew his daughter Emily was at his ex-wife's house, and that his son Henry was at New River Beach and would be returning to his ex-wife's house and that his daughter Hannah's kayaking lessons had finished early in the afternoon. He was confronted with this information on cross-examination and challenged that he knew that his children would not be at the Renforth Wharf. Mr. Oland adamantly denied the allegation and stated that the Renforth Wharf was the local hang-out. Earlier

in his direct examination, he testified that he primarily hoped to see Hannah and indicated that his ex-wife's home is located not far from the Renforth Wharf.

[243] There are some inconsistencies between the accused's statement to police and his trial evidence with respect to his expectations of seeing his children at the Renforth Wharf. Also, his knowledge of the whereabouts of his children tends to undermine his credibility on this issue. However, the accused's account is plausible given that Hannah would have been at his ex-wife's house not far from the Renforth Wharf and his evidence that the wharf was a local hang-out. Further, it must be noted that it was the accused who volunteered his visit to the Renforth Wharf to police.

[244] The Crown questions the accused's account of noticing a beer bottle and then placing it in the reusable grocery bag. The Crown suggests that this evidence is implausible as it is unlikely that one would pick up a dirty beer bottle and place it in a bag with valuable genealogical materials. Further, it is unlikely that a broken beer bottle would have been clean. I reject this attack completely. The accused's evidence in this regard is completely consistent with the Agreed Statement of Facts of Barbara Murray and Douglas Leblanc, who witnessed Dennis Oland carrying a reusable grocery bag, bending down and picking up an object and placing it in the reusable grocery bag.

[245] The Crown's contention that Dennis Oland stopped at the Renforth Wharf for the purpose of concealing or destroying evidence is not supported by the evidence.

Neither Barbara Murray nor Douglas Leblanc saw Dennis Oland throw anything away. Recall that the Renforth Wharf was extensively searched by dive teams on two occasions and there was an extensive land search, including canine units, of the wharf and its surrounding areas. No murder weapon, cell phone or anything of any interest in the investigation was found. The Crown's assertion that Dennis Oland stopped at the Renforth Wharf to destroy or conceal evidence is speculative.

I. Crime Scene Processing

[246] There were numerous shortcomings, failings and inadequacies in the way in which the Saint John Police Force defined and processed the crime scene. At the outset, the SJPF limited the crime scene to the inner offices of the FEC. Sgt. Smith, the forensic officer in charge of processing the crime scene, acknowledged that a properly defined crime scene includes potential exit routes for the perpetrator. In this case, that would include the doors of the inner office, the foyer area, the main exits and stairways to Canterbury Street and the second-floor alley exit. Sgt. Smith acknowledged that it was an error to limit the crime scene in this way because it prevented examination of all the potential areas of the crime scene where trace evidence could possibly have been located.

[247] Another failing was the uncontrolled access by police and others to the crime scene, both before and during its processing. As indicated above, some 15 persons entered the inner offices before Sgt. Smith began taking his photographs at 11:38 a.m. Even afterward, when Sgt. Smith had stepped out, Sgt. Oram and former Insp.

McCloskey entered the inner offices and wandered deeply into the crime scene. When Sgt. Smith returned, he was angry and told them in no uncertain terms to get out of the crime scene. Even Sgt. Smith himself was guilty of failing to follow basic crime scene hygiene. For example, he used booties at the crime scene and other protective gear which he wore outside onto the street, which he admitted was inappropriate.

[248] Much has been made of the second-floor alley door. The question of whether the alley door was locked or unlocked when the police arrived on July 7 was explored thoroughly. The door could not be locked from the outside except with a key. Thus, if the door was locked, then it could not have been used as an escape route. If it was not used as an escape route, then the failure of the police to forensically examine the door is of little or no consequence. Cst. Davidson testified that he checked the alleyway door and ensured it was locked during his initial visit to the crime scene on July 7. However, no other officers present at the scene corroborate this evidence, and Cst. Davidson acknowledged that he did not make any notes of the incident nor was the incident recorded in his narratives. The Defence suggests that Cst. Davidson's evidence in this regard should not be accepted.

[249] I do not have to make a credibility finding with respect to Cst. Davidson's evidence that he checked the alleyway door on July 7. However, I find his evidence in this regard unreliable. He made no contemporaneous notes. Further, he testified that when he returned to the scene on July 9, he opened the door and went out to check the surrounding area. He recalled there being no steps and an approximately five-foot drop.

He had to "boost" himself up to get back in. The preponderance of the evidence is that there were steps in place on July 9. John Ainsworth, the owner of the building, so testified. I accept his evidence and it is the best evidence on the point. In short, Cst. Davidson's evidence of his recollections on July 7 is not reliable.

[250] However, in my view it matters little whether the door was locked or unlocked on July 7. It was a natural escape route for an assailant to consider and perhaps even test before abandoning it. It ought to have been forensically examined regardless of whether the door had been locked or unlocked. The exits, including the alley door, the stairways, the foyer and the exit doors from the inner office all were potential sources of trace evidence. Uncontrolled access of persons to the inner office, together with the failure to forensically examine the areas I just mentioned, may or may not have resulted in the loss of evidence. I am mindful that this trial is not a judicial inquiry into police conduct. Further, I am also aware of the guidance of the Alberta Court of Appeal in *R v Malley,* 2017 ABCA 186, at paragraph 53, that "[a] deficient investigation may sometimes influence whether the trier of fact has a reasonable doubt, but the trier of fact should focus on the quality of the evidence, not the quality of the police investigation." Nonetheless, the police failures at the crime scene is just more "part of the mix to be considered when addressing the Crown's onus of proof beyond a reasonable doubt" (*Locke* (MBCA), at para 20). The failings of the police investigation highlighted by the Defence, although considered by me, do not weigh heavily in the final determination of this case.

J. Post-offence Conduct

(1) General Principles

[251] Post-offence conduct is evidence of words or actions of the accused occurring after the offence charged in the Indictment was allegedly committed (*R v Calnen,* 2019 SCC 6, at para. 106). In this case, the Crown asks this Court to consider two pieces of post-offence conduct as circumstantial evidence of Dennis Oland's guilt: the accused's false statement that he wore a navy blazer when he visited his father on July 6 and the fact that the Brown Jacket was dry cleaned the morning after his interview with police. As a type of circumstantial evidence, the principles discussed earlier in connection with circumstantial evidence generally apply equally to evidence of post-offence conduct, with some additional considerations. Notably, because it is evidence which is not temporally linked to the offence, it invites retrospective reasoning: the trier of fact is invited to consider the state of affairs subsequent to the offence to inform the circumstances of the offence itself (*Smith*, at para. 76; *Oland* (NBCA), at para. 62*)*. This type of evidence is susceptible to and carries an elevated risk of speculative reasoning, and it may appear more probative than it really is (*Calnen*, at para. 116*)*. As a result, I must be careful to consider alternative explanations for the accused's behavior which may be inconsistent with guilt *(R v White,* [1998] 2 SCR 72 at para. 22*)*.

[252] Courts have long recognized that certain types of post-offence conduct, such as the accused's demeanor, false alibis and lies, carry with them additional reasoning concerns requiring further limiting instructions and cautions. With respect to Dennis Oland's untrue statement that he was wearing a navy blazer, I must do more

before I can consider the statement as evidence of guilt. Our Court of Appeal set out the approach that must be taken when the evidence in question is alleged to be a lie. In *Oland* (NBCA), then Chief Justice Drapeau canvassed the pertinent jurisprudence and provided the following framework at paragraph 73:

> If the jury found the appellant's statement regarding the jacket he took to his father's office was a lie, and not merely an honest mistake as he claimed, the following rules came into play: (1) the lie, without more, was not evidence that could assist the prosecution in establishing guilt; (2) the lie could be used by the jury to support an inference of consciousness of guilt if, and only if, it was concocted by the appellant for the purpose of concealing his participation in the offence of second degree murder of his father. In this context, concoction connotes contrivance; a concocted lie is one that is made up after giving the matter some thought and, as such, it is distinguishable from an unconsidered, albeit intentional, falsehood; (3) a finding of concoction could not be made by the jury simply because the appellant lied; it could be made only if it was established by evidence independent of the evidence proving he lied; (4) if the inference of consciousness of guilt was available to the jury, it may, but need not be drawn; (5) a concocted lie is not conclusive evidence of guilt; and (6) the judge's charge should, through its general or specific instructions, or a combination of both, substantially reflect the foregoing and include an adumbration of the requisite independent evidence upon which the jury may, but need not, draw an inference of concoction.

[253] In short, mere disbelief of the statement is not enough. In order to consider it as evidence of guilt, I must not only conclude the statement was a lie, but must also conclude that it was a lie fabricated for the purpose of misleading police. This latter inference (that the accused fabricated the lie for the purpose of evasion) can only be based on evidence independent of that which proves the lie.

[254] As with all other evidence, after-the-fact evidence must be logically relevant and material to be admissible. Evidence is logically relevant if it has a

"tendency, as a matter of common sense, logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence" (*R v Grant*, 2015 SCC 9, at para. 18). It is not a high standard. To be material, the evidence must be relevant to a live issue at trial. If the evidence meets threshold admissibility (*i.e.*, it is relevant to a material issue and not excluded by an exclusionary evidentiary rule), the trial judge retains residual discretion to exclude the evidence if its probative value is outweighed by its potential prejudicial effect. If the post-offence conduct evidence supports a competing exculpatory inference that is as persuasive as the inculpatory inference, the evidence will have no probative value in determining whether the Crown has proven guilt. In that case, the evidence cannot be said to make the existence of the fact in issue more probable than it would otherwise be (*R v Osbourne,* 2019 ONSC 998, at para. 10). Consequently, that evidence would not be relevant and thus not admissible as post-offence conduct.

[255] In determining relevance and drawing reasonable inferences from post-offence conduct, it is important to identify the evidence in question, the material fact sought to be proved and articulate the reasonable inferences to be drawn from it (David Paciocco, "Simply Complex: Applying the Law of Post-Offence Conduct" (2016) 63 Crim LQ 275, at pg. 310; *Calnen*, at para. 113). The Crown offers the untrue statement about the blue blazer and the dry cleaning as post-offence conduct evidence. The Crown seeks to establish that these were attempts by the accused to conceal his involvement in the offence. The inference invited by the Crown is that only a person involved in the offence would seek to mislead the police and thus the evidence is probative of the issue

of identity. As with all circumstantial evidence, the drawing of inferences from post-offence conduct evidence must be based on the totality of the evidence and therefore should not be done until all of the evidence has been considered (*Calnen*, at para. 134). In summary, I must consider the post-offence conduct in light of all the evidence, weigh the competing inferences, consider reasonable alternative explanations for the conduct and then determine what inferences are to be drawn and the weight to be given, if any, to them.

(2) The Untrue Statement About the Blue Blazer

[256] The accused challenges the admissibility of the untrue statement regarding the blue blazer. As mentioned, the Crown submits that the only reasonable inference to be drawn from all the evidence is that the statement is a lie. The Defence argues that the misstatement about the Brown Jacket is at least equally consistent with an innocent explanation as it is with a lie and thus is not logically relevant and without probative value. Having no probative value, the statement is inadmissible. The evidence is capable of supporting competing inferences. There is no "fool proof formula" for identifying when competing inferences are equally plausible. At this stage, the best I can do is assess whether there is a reasonable basis for preferring one over another (Paciocco, at pg. 317).

[257] There is evidence which supports the inference suggested by the Crown. The Brown Jacket was subsequently found to have Richard Oland's blood and DNA on it. Further, that same jacket was brought for dry cleaning the morning after the accused's

interview by the police. There is other evidence pointing to Dennis Oland's involvement in the offence which is discussed elsewhere in these reasons, including the likely time of Richard Oland's death and his missing iPhone connecting to a cell tower in Rothesay at the same time that the accused was in the same general area (see *Oland* (NBCA), at paras. 77-79, regarding the ability to consider evidence pointing to guilt).

[258] On the other hand, the accused testified that he made a simple mistake. He explained that he had been wearing the blue blazer on the morning of July 7 (the same day as his police interview) and "I had it in my head that I must have been wearing it the day before". There are other circumstances of the interview which argue against a lie. At the time Dennis Oland made the statement he knew that Maureen Adamson had seen him in the office. Further, he made the statement after Cst. Davidson told him that they would be checking surveillance video. One could very well ask the question, "why would Dennis Oland deliberately lie knowing that he was likely to be caught?"

[259] Although it is not clear cut, I believe the inference that the false statement is a lie is the more cogent of the inferences. Accordingly, the innocent inference offered by the Defence is not "equally plausible" thus robbing the evidence of its logical relevance. In Ruling #5 (2018 NBQB 255), I found that the innocent inference is less cogent but still available for consideration by the trier of fact. In that ruling, I also declined to exercise my residual discretion to exclude the evidence on the cost benefit analysis. I reiterate my previous ruling. The misstatement regarding the Brown Jacket

meets threshold admissibility (support for this conclusion can also be found in *Oland* (NBCA), at paras. 53 and 83).

[260] As mentioned, before I can consider the untrue statement as evidence of guilt I must be satisfied that it was deliberately concocted. In light of my conclusion with respect to the question of concoction (see following), it is not necessary for me to resolve whether the untrue statement was a lie or a mistake.

[261] Once it is established that there has been an out-of-court statement by the accused which is untrue, the difficulty is often to determine what may constitute independent evidence of fabrication (*Tanasichuk*, at para. 64). Most often this evidence can only be found by examining the circumstances in which the false statement was made. In *R v O'Connor* (2002), 62 OR (3d) 263 (ONCA), the Court stated at paragraph 26:

> In addition, the circumstances in which an accused, or a person who eventually becomes an accused, makes an out-of-court statement which is found to be untrue may have an evidentiary value that is not present in the circumstance where an accused testifies and is disbelieved. False exculpatory statements made by a person upon being informed that a crime has been committed will in some circumstances be consistent with that person being conscious of having committed the crime, and may point to guilt in the same way that other after-the-fact conduct such as flight, a threat to a witness, or concealment of evidence can be probative of guilt. The circumstances in which a false statement is made may show an intent to mislead the police or others or an intent to deflect suspicion and may be evidence of a conscious mind that he or she has committed an offence. When a court is addressing the admissibility of evidence contradicting an accused's out-of-court statement, it will be required to determine if there is independent evidence of fabrication, but in doing so, the court may consider the circumstances [page275] in which the allegedly false statement was made. If those circumstances tend to support a conclusion that the accused made a false statement because he or she was conscious of having committed the offence, then those circumstances may be used as independent evidence of fabrication.

[262] Similarly, in *Tanasichuk* the Court commented on the importance of circumstances in which the accused made the statements. At paragraph 65, Justice Richard (as he then was) stated:

> In the present case, the trial judge applied the framework outlined above and found that the circumstances in which the accused made the statements and their detailed nature "[constitute] sufficient evidence upon which a jury could conclude that [Mr. Tanasichuk] fabricated the statements in order to mislead the police and divert suspicion from himself." I can discern no error in either the trial judge's approach or his conclusion. In fact, I agree with the argument put forth by Crown counsel that this is a classic application of the rule. **The impugned statements were made in circumstances where one would expect nothing but the truth.** They were made in the context of reporting a missing person where one would expect nothing but frank disclosure in order to assist the police in locating Maria Tanasichuk. At least at the time of the initial reports, **Mr. Tanasichuk would not have been considered a suspect and** there would have been no reason for him to believe otherwise. **The details in the statements were very precise as to time, place and the circumstances surrounding Maria Tanasichuk's disappearance.** In reaching the conclusion that the statements, together with the evidence showing that they were false, were admissible, I once again adopt the reasoning and the words of O'Connor A.C.J.O., this time at paras. 31-32:
>
> > If the jury were to disbelieve the appellant's statements, they might fairly ask **why would the appellant tell such detailed and specific lies to the investigators. Why not tell the truth? And how was it that the appellant was so well prepared with a detailed and precise statement about his whereabouts when questioned by the police?** In my view, it would be open to a jury to use the evidence of the circumstances surrounding the making of those statements and the nature of the statements themselves to conclude that the appellant fabricated the statements to avoid suspicion.
> >
> > To be clear, it is not the evidence establishing the falsity of the statements which constitutes the evidence of fabrication; **rather it is the evidence of the circumstances in which the disbelieved statements were made and the detailed nature of those statements which, in my view, is capable of furnishing the independent evidence of fabrication.**
> >
> > [Emphasis added]

[263] The Crown has identified 19 circumstances that it says constitute independent evidence of fabrication. They generally fall into five categories:

1. Circumstances surrounding the interview;
2. The level of detail of the statement;
3. Other instances of obfuscation;
4. Demeanour; and
5. Subsequent discovery of blood and DNA and dry cleaning.

[264] The Crown points to the circumstances of the interview and, in particular, that the accused was not a suspect at the time he was interviewed. In addition, the interview was conducted in conjunction with routine interviews of other family members, he attended the police station of his own volition and there is no evidence of any detention or coercion. Although not articulated, the Crown implies that the statement was given under circumstances where one would expect the accused to tell the truth. I agree.

[265] With respect to the level of detail, the Crown argues that the accused gave a very detailed statement describing text messages, phone calls and the clothing he was wearing. The Crown points out that he provided the colour of the jacket without prompting from police and made the false statement twice. In my view, the details with respect to other aspects of the statement are irrelevant. It is only the level of detail with respect to the alleged lie which I believe is cogent. In this case the statement about the colour of the jacket arose in connection with a simple question from Cst. Davidson. The entire exchange is set out below:

SD: Okay. And ah, what were you wearing? 'Cause we...I just want to make sure who was coming in, who was going out. When we look at the surveillance I can say...

DO: Mm hm.

SD: ...that's Dennis, and that's this guy.

DO: Um, these pants, these shoes, a dress shirt, and a navy blazer.

SD: You were wearing every...tho...those pants, those shoes...

DO: Yeah.

SD: ...and a navy blazer.

DO: Yeah.

[266] In my view, there was no detail or embellishment in the statement. Dennis Oland was never asked again what he was wearing. During the rest of the interview there was nothing said to the accused to bring home the importance of the issue to him or to allow him to reassess his statement. It was a simple response to a simple question made without embellishment and detail. This is unlike other cases where precise details of time, place, circumstances or elaborately implausible explanations belie deliberate fabrication.

[267] It should also be noted that Dennis Oland identified other items of clothing that he wore during his visit to his father's office, including the same pants and shoes he was wearing during the police interview. If his intent was to divert the police attention from key pieces of evidence, then it seems that he would have lied about these as well. I have already addressed the question of demeanour evidence and I give it little or no weight. The Crown's submission that the accused became confused, evasive and hesitant is of little value.

[268] The Crown points to another matter as independent evidence of fabrication. The Crown submits that Dennis Oland had premature knowledge of the manner of Richard Oland's death. In support, the Crown points out that prior to his police interview on July 7 neither Dennis Oland nor any member of his family had been informed about the manner of Richard Oland's death. During the interview the Crown says that the accused wondered about what had occurred to his father and speculated that it could have been a "crackhead" or someone upset by something Richard Oland had said. Later in the interview he is asked if he knew the type of person that would do this and he responded, "someone who's pretty sick, I guess". The Crown says that these responses indicate the accused had premature knowledge of the manner of death. I disagree.

[269] Cst. Davidson testified that when he met with the family in the afternoon on July 7 he told them it was a suspicious death. The family had received calls from people earlier in the day telling them of the large police presence at 52 Canterbury Street. In his police interview Dennis Oland explained that he and the family had realized earlier in the day that it was not a death by natural causes and it "didn't smell good". In the interview he explained that the family came to the understanding that somebody had done something to Richard Oland.

[270] Dennis Oland's speculation that it could have been a "crackhead" formed part of a more expansive response that included the possibility of the death being natural or the result of a drug reaction. Dennis Oland went on to say that "it just doesn't smell

like that's what's going on". Finally, the accused's comment about it being "someone who is pretty sick" was made in response to a question that implied Richard Oland was killed and asked what type of person would do it.

[271] The evidence is clear that by the time of the interview both Dennis Oland and his family knew Richard Oland's death was suspicious and that it triggered an extensive police response. They came to the understanding that someone had done something to Richard Oland. While Dennis Oland may not have been informed of the details of the cause of death it is reasonable that he and his family suspected foul play. In my view the accused's statements do not betray any detailed knowledge of the cause of Richard Oland's death and certainly not knowledge that would be known only to the killer.

[272] There is some merit to the Crown's contention that the accused deliberately obfuscated certain facts during his police interview. The accused entirely omitted a third visit to the office despite recalling having parked three times. I reject the Defence suggestion that, by telling the police in the interview that he parked a third time in the gravel parking lot, he intrinsically told them of the third visit. Clearly he did not. This evidence, together with the fact that Richard Oland's DNA and blood were subsequently found on the Brown Jacket and that the Brown Jacket was taken to be dry cleaned, are evidence in favour of concoction.

[273] A finding of concoction, that is, that an accused deliberately lied because he was conscious of having committed the crime, is potent evidence against that accused. It is for that reason that care must be exercised in drawing inferences of fabrication. There is other evidence regarding the circumstances of giving the statement which are inconsistent with such a finding. I have outlined that evidence above. I am particularly concerned with the lack of detail and precise narrative which are often hallmarks of deliberate planning and thus concoction. In short, I am not satisfied that there is sufficient evidence to conclude that Dennis Oland's untrue statement about the jacket is a lie fabricated for the purpose of deceiving the police. I, therefore, cannot consider the untrue statement to infer consciousness of guilt.

(3) The Dry Cleaning

[274] The other item of post-offence conduct evidence upon which the Crown seeks to rely is the fact that the Brown Jacket was dry cleaned the day after Dennis Oland's interview with the police. The Crown proffers this evidence in support of the inference that Dennis Oland had the Brown Jacket dry cleaned to conceal his involvement in the offence. The Defence, on the other hand, argues that there is no basis to infer that Dennis Oland, as opposed to Lisa Oland, was responsible for the decision to take the garments for dry cleaning. Thus, the evidence is not probative or admissible. The accused further argues that, in any event, the dry cleaning is at least equally consistent with an innocent explanation.

[275] The Brown Jacket was brought into VIP Dry Cleaners on the morning of July 8 by Lisa Oland. In all, 19 garments were dropped off. All belonged to Dennis Oland and none belonged to his wife or children. Of course, the Brown Jacket was subsequently found to have Richard Oland's blood and DNA on it.

[276] The dry cleaning of the Brown Jacket on the day following Dennis Oland's interview, and the subsequent discovery of Richard Oland's blood on it, is certainly suspicious. On the other hand, the Defence submits that the dry cleaning is consistent with a perfectly innocent explanation: the garments were required for the pending funeral visitations and associated proceedings. The Defence points out that there is nothing suspicious about the request for next day service as Ms. Choi testified that the request for next day service was consistent with the previous occasion of dry cleaning. Furthermore, the Defence argues that if Dennis Oland sought to conceal evidence he would have arranged for the dry cleaning on July 7, not July 8, and he would not have left the dry-cleaning tags on the Brown Jacket for the police to find.

[277] These competing inferences with respect to the dry cleaning are probative only if Dennis Oland was involved in the dry cleaning of the Brown Jacket. The Crown concedes that if the accused had no hand in the jacket being dry cleaned, then the Crown's theory of after-the-fact conduct on this point is moot and of no probative value.

[278] In support of its theory that the accused was involved in the Brown Jacket being dry cleaned, the Crown points to the fact that it was brought in for dry cleaning less than 10 hours after his interview with police ended. The Crown also points to an apparent conflict between Dennis Oland's trial testimony and that of Ms. Choi. Dennis Oland testified that his earliest recollection of being aware of the Brown Jacket being dry cleaned was on Sunday, July 10 when his step-son Andru was trying on his clothing. Ms. Choi testified that she recalled seeing Dennis Oland waiting in the car while his wife picked up the dry cleaning on July 9. Further, on cross-examination Dennis Oland agreed that he would have noticed a void in his closet after the garments were taken for dry cleaning. Lastly, the dry-cleaning receipt issued on July 8 was found in or around the accused's dresser in the master bedroom, along with his key pass, boat pass and certified cheques to his ex-wife. The Crown, relying on this evidence, asserts that the only logical inference is that the accused directed or at least knew that the Brown Jacket was being sent for dry cleaning on July 8. I disagree.

[279] Dennis Oland was placed under police surveillance immediately following his police interview on July 7. There is no evidence derived from the surveillance indicating that Dennis Oland attended VIP Dry Cleaners on July 8. With respect to the location of the dry-cleaning receipt, there is evidence to suggest that the receipts and other papers were placed together by police during the search. Sgt. Henderson testified that he was not sure if they were on the dresser or in the dresser drawer when they were discovered. In any event, the fact that the dry-cleaning receipt was in or on the dresser is of little consequence. Whether placed there by the accused or his wife, it was obviously

done after the dry cleaning was dropped off. It does not support an inference that Dennis Oland knew or participated in having the Brown Jacket dry cleaned. It is perfectly plausible that Lisa Oland would attend to having her husband's garments dry cleaned in advance of the pending funeral rites. In short, there is no evidence of Dennis Oland's involvement in the dry cleaning and thus the evidence is of no probative value.

K. W.D. Analysis – Shaw, Ainsworth and Dennis Oland

[280] As mentioned at the outset, the *W.D.* analysis applies to exculpatory evidence whether offered by the Crown or the accused. In this case, the testimony of Anthony Shaw, the *KGB* statement of John Ainsworth and the statement and testimony of the accused are subject to the *W.D.* analysis. The analytical steps bear repeating:

1. The burden is on the Crown to prove guilt beyond a reasonable doubt and the accused is not required to prove his innocence or disprove any of the evidence led by the Crown;

2. If I believe the accused's evidence denying guilt, or if I am not confident that I can accept the Crown's version of events (that is, I am left with a reasonable doubt after considering that evidence), I must acquit;

3. If after carefully considering all the evidence I am unable to decide which version of events is true then I must acquit;

4. Even if I completely reject the accused's evidence, I cannot simply assume the Crown's case is proven; rather my task is to carefully assess the evidence I do believe and decide whether that evidence persuades me beyond a reasonable doubt that the accused is guilty.

(1) Shaw and Ainsworth

[281] I have already dealt with the testimony of Anthony Shaw and the *viva voce* evidence and *KGB* statement of John Ainsworth in some detail. I will not repeat that analysis. Certainly, I find Anthony Shaw's testimony to be both credible and reliable. The *KGB* statement of Mr. Ainsworth corroborates that testimony. Even the *viva voce* testimony of Mr. Ainsworth does not contradict Mr. Shaw's evidence that he believes he heard the noises at 7:30 p.m. on July 6.

[282] Notwithstanding the credibility and reliability of Mr. Shaw's evidence, I cannot wholeheartedly accept it. The digital, cell phone, computer and other evidence inconsistent with Mr. Shaw's time estimate prevents me from conclusively determining Richard Oland's time of death in accordance with Mr. Shaw's estimate. I am, therefore, left in the dilemma of being unsure as to whether Mr. Shaw's evidence should be accepted or not. In short, I have a reasonable doubt as to whether Richard Oland was killed prior to 6:44 p.m. or when Mr. Shaw says he heard the murder at 7:30 p.m. In the circumstances of this case, if I have a reasonable doubt as to the time of death, I must acquit the accused.

(2) Dennis Oland

[283] Dennis Oland provided a video statement to police and a "pure version", written statement, both of which were entered into evidence. Dennis Oland also testified in his own defence at trial. In both his statement to police and his testimony, Dennis

Oland denied any involvement in his father's death. I must assess the credibility of this evidence in accordance with the *W.D.* principles set out earlier.

[284] A great deal of Dennis Oland's testimony was devoted to his activities on July 6 and 7, the genealogical research he conducted in England, genealogical materials he gathered, his relationship with his father and his finances. I have already discussed in detail the evidence regarding the filial relationship and Dennis Oland's finances and made certain findings which need not be repeated here. The evidence with respect to Dennis Oland's activities was intended to highlight their mundane nature and demonstrate that everything was normal. I have also already assessed this evidence in some detail. His testimony regarding the genealogical research and materials is intended to corroborate his stated purpose for visiting his father on July 6: to discuss genealogy and retrieve the Logbook.

[285] The Crown does not dispute that Dennis Oland and his father had a discussion about genealogy. Similarly, there seems to be no controversy regarding Dennis Oland's mundane activities and his trips abroad. Much of Dennis Oland's testimony can be characterized as general or neutral evidence. However, the *W.D.* analysis applies only to exculpatory evidence and does not concern itself with evidence that is inculpatory or neutral (*Ryon*, at para. 30). Accordingly, I will focus on those aspects of Dennis Oland's testimony which are exculpatory and those which, in my view, raise issues of credibility.

[286] With respect to Dennis Oland's description of his relationship with his father, I reviewed that evidence earlier. As stated, I disagree with the Crown's contention that Dennis Oland's *viva voce* testimony stands in stark contrast to his statement to police regarding his characterization of the relationship with his father. I do note, however, that Dennis Oland's testimony paints a rosier picture of the relationship than his police statement. I also note that he failed to mention to the police the regular Sunday visits with his father that he described in his testimony.

[287] Dennis Oland's finances were a mess in July 2011. The Crown submits that when confronted by clear examples of financial distress, Dennis Oland preferred to explain that money was "tight" and that he would simply increase his income in order to rectify his financial situation. Dennis Oland testified in direct examination that the ongoing accumulation of debt was of no concern to him. The Crown submits that Dennis Oland's attitude toward his financial difficulties is implausible and undermines his credibility. I accept that the average person would be distressed to find themselves in similar financial straits. Perhaps Dennis Oland should have been. However, viewed in the context of his history of financial distress and bail-outs by his father, Dennis Oland's response to the situation is not implausible.

[288] There is, however, one aspect of Dennis Oland's testimony regarding finances that is simply not credible. Dennis Oland sent an email to his supervisor at Wood Gundy, John Travis, seeking an advance on his pay. In the email dated June 1 (Ex. C-119), Dennis Oland advises his employer that he expects to increase his book of

business. In the email Dennis Oland clearly states that by August/September "we are looking at total new assets in the $10-20 million range". The clear and unequivocal meaning of that email is that Dennis Oland was telling John Travis that he expected to have an additional $10-20 million invested by his father and another unnamed investor. In his testimony, he explained that he meant he was going to alter his business development plan and that $10-20 million was his target. The explanation is not credible.

[289] I have already addressed the accused's evidence with respect to his visit to the Renforth Wharf. Recall that there are inconsistencies between the accused's statement to police and his *viva voce* testimony. In his statement he suggested to Cst. Davidson that he expected to see his children at the Renforth Wharf because they swim there after kayaking lessons. On cross-examination he admitted that by 5:05 p.m. he knew his daughter Hannah's kayaking lessons were finished for the day and his two other children were otherwise occupied. In his testimony, he explained that he expected to see Hannah at the wharf because it is a local hang-out and near his ex-wife's home. While Dennis Oland's explanation for the visit is plausible, there is an inconsistency between his statement and his testimony. In my view, this tends to undermine his credibility.

[290] There is much to implicate Dennis Oland in this crime. He was the last known person to have seen his father alive on July 6. The Brown Jacket he wore during that visit was found to have his father's blood and DNA on it. When interviewed by police, he told them he was wearing another jacket. The Brown Jacket was dry cleaned the morning after that misstatement. Richard Oland's iPhone was the only item missing

from the crime scene and happened to connect to a cell tower in the Rothesay area at approximately the same time that Dennis Oland was in the same general area, 10 minutes after leaving his father's office. One might consider these circumstances to be more than mere coincidence.

[291] But more than suspicion is required to convict a person of murder. Probable guilt is not enough. In a circumstantial case such as this, there must be a sufficient assembly of the pieces of the evidential puzzle to form a picture that is consistent with guilt and only consistent with guilt. In a circumstantial case one expects that there will be evidential gaps in the puzzle. The question becomes whether there are sufficient pieces of the puzzle to reveal a portrait of guilt beyond a reasonable doubt.

[292] I have determined that the Crown has failed to establish a motive for Dennis Oland as the killer. Motive is not an essential element of the offence. However, it is a piece of circumstantial evidence that provides context for the interpretation of the evidence. Without motive, the trier of fact is being asked to put the jigsaw puzzle together without the benefit of seeing the picture on the puzzle box.

[293] As expected, there are missing puzzle pieces. Despite extensive searches, no murder weapon was found or linked to the accused. Despite a bloody murder scene, careful forensic examinations of Dennis Oland's car, Blackberry, the shoes he was wearing and the grocery bag carried in and out of his father's office revealed no blood or

other trace evidence linking the accused to the crime. While the presence of his father's blood on the Brown Jacket is indicative of the accused's presence during the murder, the small number and size of the bloodstains on the jacket is inconsistent with the bloody crime scene, and no plausible explanation for the lack of blood is evident.

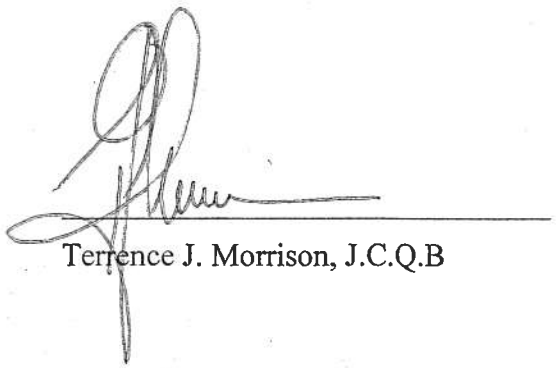
[294] There are other puzzle pieces that are unexplained. The discovery of the footwear impression and Gerry Lowe's observations fall into that category. Others relate to the theory of the case advanced by the prosecution. The Crown's theory of the case is that Dennis Oland went to his father's office, asked for money and was refused. The Crown theorizes that Dennis Oland, consumed with rage, returned a few minutes later and murdered his father. Where did the murder weapon come from? Was it just coincidentally available? The evidence is clear that the murder weapon had to have been brought in and removed from the crime scene. This bespeaks premeditation and does not fit with the Crown's theory of the case: a crime of passion born of an enraged mind.

[295] A central and critical piece of the evidential puzzle is the time of Richard Oland's death. If Richard Oland was killed any time after 7:00 p.m., then Dennis Oland could not have been the killer. While there is persuasive digital and cell phone evidence that Richard Oland was dead by 6:44 p.m., it is not conclusive. For the reasons outlined above, the evidence of Anthony Shaw and John Ainsworth raises a reasonable doubt as to the time of death.

[296] Having considered all of the evidence, including the frailties in Dennis Oland's testimony outlined above, I cannot accept outright the accused's denial of guilt. However, I am not confident that I can accept the Crown's version of events. There are too many missing puzzle pieces to form a coherent portrait of guilt beyond a reasonable doubt. In short, I am not satisfied that the Crown has proven beyond a reasonable doubt that it was Dennis Oland who killed Richard Oland.

VI. CONCLUSION

[297] I find the accused, Dennis Oland, not guilty of the murder of Richard Oland.



Terrence J. Morrison, J.C.Q.B